

ON INHERITANCE ACCORDING TO DAYABHAGA.

FIRST the son, then the grandson, then the greatgrandson succeeds to the property of a deceased person. If there are more than one of them, then they divide the property equally among themselves. Formerly, there was a custom of giving a deduction or a double share to the eldest born son ; but it is obsolete now. By the word son we are to understand either an aurasa or a dattaka (*i. e.* given) son or a kritrima, (*i. e.* made) son. The kritrima son, or kortaputtre, as he is called in the vernacular, is confined solely to the District of Tirhoot or Mithila, as a part of the Customary Law. An aurasa son is defined by Manu :—“ A son begotten upon one's own wife, married in the valid and proper form, is called an aurasa son. He is superior to all other kinds of sons.” This excludes a bastard. If some of the sons are dead, leaving their own male children, then these grandsons, together get the same share which their father would have got, had he been alive. Again, if some of the grandsons are dead, leaving male children, then these greatgrandsons together get the same share that their father would have got, if alive. But no grandson gets any share, unless his father is dead ; again, no greatgrandson gets any share, unless both his father and grandfather are dead. When the deceased leaves no son, grandson or greatgrandson, then his widow succeeds to his property. If there are two or more widows, they together get the property. In such a case, there is no inherent right to make a partition ; but Courts allow a convenient arrangement for division of the profits. If one of the widows dies, then the surviving widow or

widows again enjoy the whole. Where there is a son, or grandson or greatgrandson, the widow has a right to maintenance out of the husband's property, and also a right to reside in the house of the husband, from which she can not be driven out by the son, &c., or any purchaser from them. The widow's right is limited solely to the enjoyment of her husband's property; she can not make a gift, or mortgage or sale of it. She is also enjoined to live in her husband's house after her husband's death; but she does not forfeit her right to the property, simply because, after her husband's death, she goes and lives in her own father's house, provided she does not do so for any unchaste or improper purposes. It has been held by a F. B. of the Calcutta High Court, that if after the death of her husband, the widow becomes unchaste, she does not lose her right to the property. But the law is settled, that if unchastity is committed before the husband's death, and the husband has not condoned it, the widow cannot succeed to her husband's property after his death. By Act 15 of 1856, the Widow Marriage Act, if a widow remarries, she loses her right to her 1st husband's property. On this Act, it has been held, that if the widow succeeds as heir to a son of her 1st husband, she does not lose that right. Again, it has been held that if a Hindoo widow first becomes a Mussulman, and then re-marries, she does not lose her 1st husband's property. Widow's right to husband's property is not like her right to her Stridhan or peculiar property; because she can do just as she likes with her Stridhan; excepting only land given to her by her husband. Though a widow's right is limited to enjoyment, it is still considered as an estate of inheritance, and not a life estate, nor an estate in trust for her husband's soul, *i. e.*, she is not to be considered as a trustee; but she has a beneficial interest in the property. After the widow's death, the person who takes the property is called the reversioner. Original texts lay down that this enjoyment on the part of the widow must not be a luxurious or a wasteful one. She must not wear fine clothing and ornaments; but is to make such

an use of it, as suffices for her subsistence ; the object being that she may live and continue to perform the proper ceremonies for the benefit of the soul of her husband. Law gives her a right to alienate the property for the sake of proper religious ceremonies. For instance ; as soon as the husband dies, the widow becomes entitled to the property ; now, if the shradh of her husband cannot be performed without raising money, the widow may mortgage the property and borrow money, and spend it in shradh ; or she can even sell it if necessary : similarly, she can sell or mortgage for the shrad of her father-in-law or mother-in-law, and in general for the shrad of all persons whose shrad it would have been incumbent upon her deceased husband to perform. These and similar other occasions for expenditure are in general terms called legal necessities. Besides the shrads, the marriage of daughters, indispensable religious ceremonies, maintenance of herself and of infant daughters, and pilgrimage to Gayà, have been held to be valid legal necessities, authorizing the widow to mortgage or sell her husband's property to which she has succeeded as her husband's heir. The Privy Council have held that a widow's powers of disposing of her husband's property are more extensive for religious purposes than they are for temporal purposes. They have also held that if the widow is the heir, and there are no heirs entitled to the reversionary interest, even then she has no absolute disposal over the property, but the Crown, the *ultimus haeres*, can interfere to set aside alienations made by her. This they have held on the ground that her incapacity for unlimited disposal is inherent in the kind of estate which she takes in her husband's property. This incapacity has no connection with the existence or nonexistence of the reversionary heirs. It is, they say, an anomalous estate, not an estate for life, but an estate of inheritance with restricted powers. She represents the inheritance so long as she lives ; so that if there be a suit between her and the third parties, the decree in that suit, connected with the husband's property, will be binding upon the reversionary heirs who eventually succeed to the

property after her death. If the widow sells the property without legal necessity, the sale is valid so long as she lives; but the reversioner will take possession after her death; and even during her lifetime, the reversioners can bring a suit for a declaration that the sale is not binding as against them.

After the widows, come the daughters. And the estate of a daughter is exactly similar to that of a widow; being an estate of inheritance with restricted powers. If there are more than one daughter, they are equally entitled, and on the death of one the survivor gets her share. But the daughter to succeed must be a qualified one; by a qualified daughter is meant one who has or who is likely to have a male child. 'Likely to have a male child' means 'a daughter whose husband is alive.' That is generally understood to be the sense of the phrase. No case has yet been decided of the following character. Daughter's husband is alive, but she is so old that her monthly courses have ceased. 'Is she entitled to succeed? The rule excludes a barren, and a widowed daughter who has given birth solely to female children. But it must be remembered that if there be unmarried daughters, they will exclude all the others. It has been decided now, that if an unmarried daughter succeeds, and then dies leaving male children, then the married daughter will get the property. Formerly the law was that the unmarried daughter's male children excluded the married daughters. The reason why unmarried daughter excludes her married sister is, that unless she were married before her courses begin, the forefathers would be doomed to go to hell. But as marriage requires expenditure of wealth, it is proper that the father's wealth should go to the unmarried daughter. The reason why the married daughters succeed only when they have or are likely to have male children is that their male children might offer oblations to the deceased, the daughter's father. But the unmarried excludes the married, because the unmarried has two reasons in her favor; her future son will offer oblations: and her marriage averts the possibility of a hell. In

the text of Vrihaspati, cited (D. 11, 2, 8), the daughter qualified to inherit is described as 'taking a pleasure in waiting upon her husband.' From this it follows that an unchaste daughter can not succeed. But if she becomes unchaste after succession, her estate is not forfeited. Similarly if a married daughter with her husband living does succeed on that ground, but becomes a widow before giving birth to a male child, this would not forfeit her estate. Similarly, if a widowed daughter with male children, does succeed on that ground, and then after succession, all her male children die, this would not forfeit her estate, on the ground that she is no longer a qualified daughter. These are instances of the operation of a certain rule of Hindu Law, which is thus stated, that an estate once vested is not divested under that law. This rule was first applied by Sir Barnes Peacock in the case of Kali Doss Doss. There the father had two sons, one blind and therefore disqualified to inherit, and the other a son who had no personal defects so as to disqualify him for inheritance. When the father died, the qualified son inherited, and the blind man got nothing. Afterwards, a son was born to the blind man. Now the law about disqualification for personal defects is, that the qualified sons of disqualified persons will inherit. The question therefore arose in the above case whether the subsequently born son of the blindman could take a share from his uncle. Sir Barnes ruled that he could not, founding his decision upon the principle, that estates once vested can not be divested. But this principle is not universally applicable. For instance. If a husband dies, leaving with his widow permission to adopt, the son adopted by the widow divests the estate vested in the widow.

In the absence of heirs as far as the daughter, the daughter's son is the heir, his heirship is founded on the fact that he offers a pinda to his maternal grandfather in the parvana ceremony, and also to the two immediate ancestors of the maternal grandfather, namely his father and grandfather. The parvana ceremony, otherwise called the traipurushika pinda,

consists in giving pinda to 6 ancestors on the same occasion ; i. e. to the three immediate male ancestors from the father upwards, and the three immediate male ancestors from the maternal grandfather upwards. The reason why a daughter's son is postponed to a son, grandson and greatgrandson is partly because there are express texts to that effect, and also because the funeral cakes on the maternal side are supposed to be of an inferior religious efficacy. The daughter's sons always succeed *per capita*, and not *per stirpes*, because there are no express texts to that effect ; whereas with regard to the descendants in the male line, there is an express text of *Yājñavalkya* which says—where the fathers are different, the division is by having reference to the fathers. There is no such text which says that where the mothers are different, the division is made by having reference to the mothers. When a maiden daughter dies, after having succeeded to her father's estate, on her death, such heirs of the father will take as would have taken if the maiden daughter had not at all existed. This is a difference between male heirs and female heirs ; all male heirs are said to be full owners, but the female heirs have no full ownership. Full ownership is called in Sanskrit, निर्वाह स्व । The results of full ownership are, that when the full owner dies, we must trace the heir from him ; whereas when a female heir dies, we must trace the heir from the last full owner. Another result of the difference between male and female heirs is that a full owner has an absolute power of disposal over the property succeeded to as heir ; while the female owner's right is always qualified and restricted, like that of the widow, as regards property to which she has succeeded as an heir. The principal female heirs are (1) wife, (2) daughter, (3) mother, (4) grandmother. Each of them is a qualified owner, and never a full owner. The rules with regard to the widow apply to each of them.

After the daughter's son, comes the father. He is inferior to the daughter's son for this reason. Daughter's son gives a pinda to the deceased ; he also gives 2 pindas to two persons to whom

the deceased was bound to offer pindas ; while the father gives no pinda to the deceased, but only gives pinda to 2 persons to whom the deceased was bound to offer pinda. But the father is superior to the mother ; for this reason, that the mother gives no pinda at all ; while the father gives two pindas in which the deceased participates. Herein must be remembered another rule with regard to the offering of pindas. Viz., that every male person participates in all the pindas that may be offered by any other person to his father, or grandfather or great-grandfather in the paternal line ; the other rule is that every male person gives pinda to three immediate male ancestors either in the paternal or in the maternal line. From this it follows that daughter's son gives three pindas which the deceased partakes of, and father gives 2 such : therefore father is postponed to daughter's son ; but father is superior to mother, for at least he gives 2 pindas which the deceased partakes of, but the mother none. The superiority of the father is also based upon the text of Manu ; "Of the seed and the source, the seed is superior." Also there is the express text of Vishnu, giving the inheritance first to father. He is a full owner, when he gets the property, it is absolutely at his disposal ; and when he dies, his heirs get it. * Mother succeeds in the absence of father ; the reason assigned is that she is the source of existence, and nursed the deceased in his childhood ; therefore the son is under great obligations to her ; these are repaid by giving the inheritance to her ; another reason is that she gives birth to brothers, who give such pindas as the deceased may partake of. She is superior to brothers. The mother is not a full owner ; her ownership is restricted like that of the widows ; and all the rules applicable to the widow apply to her. It has been held that if the mother is unchaste, when the succession opens, she has no right to the inheritance. After the mother, the inheritance goes to the brothers, the reason being that a brother gives 3 pindas of which the deceased partakes ; he also gives 3 pindas to the 3 maternal ancestors which the deceased was bound to give ; therefore the brother is a bene-

factor, in the spiritual sense, and he also in a manner occupies the place of the deceased. Brother is superior to a brother's son, who is not so great a benefactor. Brother is inferior to mother; for the mother is the root or the link of relationship. Among brothers, the uterine brother excludes a half-brother; because the uterine gives a double set of pindas, while the half-brother gives a single set. In the absence of uterine, a half-brother succeeds, before the son of a uterine brother, because the first gives 3 pindas eaten by the deceased, the latter only 2. There is this further rule with regard to brothers:—If there is a reunited full-brother, and an unreunited full-brother, the former excludes the latter. Similarly, a reunited half-brother excludes an unreunited half-brother. But if the half-brother be reunited, and the full-brother unreunited, they equally divide. Reunion consists in association as regards property after a division has been once made. Reunion can take place only with a father, brother or paternal uncle. The result of reunion upon succession is this, that reunion is equivalent to full blood. Formerly the rule was that if all the brothers were undivided; the fullbrothers and half-brothers all shared alike: but now a F. B. has decided that, divided or undivided, full-brother always excludes half-brothers, provided both are re-united or both are un-reunited. This rule of preference on the ground re-union applies to the case of brother's sons and paternal uncles when they succeed. After all descriptions of brothers, brother's sons succeed. First full brother's son, then half-brother's son; this preference is based upon the circumstance, that when the full brother's son gives pinda to the father of the deceased, who is identical with the grandfather of the ^{full brother's son} deceased, then the mother of the deceased partakes in it; but when the half-brother's son does so, his own paternal grandmother, viz., half-brother's mother; the step-mother of the deceased, partakes, not deceased's own mother. This rule of spiritual law is founded on a text cited (D. 11, 6, 3.) "The mother eats oblation with her own husband; so the paternal grandmother, with her own husband; so the paternal

greatgrandmother with her own husband." Here the words, mother, grandmother, greatgrandmother, do not include step-mother, &c. 'And there is another text which says that if any person, male or female, dies, without giving birth to a son, no párvana sraddha can be performed for that person; only ekoddishtha can be performed for him. From this it follows that if a stepmother dies without giving birth to a son, the párvana which is performed by her step-son can not be partaken of by the step-mother; this rule is equally applicable to the step-grandmother; whence follows the rule of succession, that a full-brother's son excludes the half-brother's son. With regard to brothers' sons also, the rule of preference on account of association applies. *i. e.* An unassociated full brother's son and an associated half-brother's son succeed equally; while when both are associated or unassociated, full brother's son excludes the half-brother's son. A question arises, who is superior, a full-brother's son or a father's full-brother? a father's full-brother gives pindas to two ancestors with their respective wives, which the deceased was bound to give,—a full-brother's son also gives two such pindas; therefore a full-brother's son, and a father's full-brother ought to inherit together. But the *Dáyabhága* says that as the full-brother's son gives pinda to the father of the deceased; while the father's full-brother does not do so; and the father is the chief person out of all the recipients of pinda from a particular person; therefore full-brother's son is superior to father's full-brother. For a similar reason, the *Dáyabhága* expressly says that a brother's son's son excludes a paternal uncle, because the former gives pinda to the chief person, the father of the deceased. But a brother's greatgrandson does not exclude the paternal uncle, because he is not a sapinda, while a paternal uncle is one. The following are the express rules of succession declared in the *Dáyabhága*. (1) In default of father's descendants as far as his greatgrandson, father's daughter's son, *i. e.* one's sister's son, succeeds. (2) Similarly, the descendants of the grandfather, including his

daughter's son ; and then the descendants of the greatgrandfather, including his daughter's son will succeed according to the rule of nearness founded on the pinda. (3) These three daughter's sons, viz., father's, and grandfather's, and greatgrandfather's, give pindas in which the deceased participates. (4) They are included in the term 'sapinda' used in Manu's general rule of succession—that rule is—'out of the sapindas, he who is nearest, inherits the property ;—in default of sapindas, a sakulya succeeds ;—in default of sakulyas, a samanodaka.' Yājñavalkya specifically names as far as the brother's son ; then he uses the general term 'gotraja' or 'born in the same family.' This term 'gotraja' excludes all females, who have come into the family by marriage, because they are not born in the family. Baudhāyana excludes all the females. The exceptions to the rule of exclusion are (1) widow (2) daughter (3) mother (4) grandmother (5) greatgrandmother, &c. But the rule of exclusion applies to (1) son's widow (2) brother's widow (3) uncle's widow, brother's son's widow, and so on. These females are all sapindas ; the rule with regard to the female sapindas is, that those whose husbands are sapindas are themselves sapindas. Yājñavalkya says, after the 'gotrajas' or 'those born in the same family, come in bandhus.' These 'bandhus' are maternal uncles and others. They are next in point of pinda, after the descendants of the greatgrandfather as far as his daughter's son. A maternal uncle is next in point of pinda, because he gives pinda to maternal grandfather, &c., to whom the deceased was bound to give : A maternal uncle gives pinda to maternal grandfather of the deceased, and to the two other immediate ancestors above ; these pindas the deceased was bound to give. Now two objects are gained by wealth ; one is enjoyment of pleasure, which requires expenditure of money ; the other is, that gifts are made whereby religious merit is acquired, and a right to enjoyment in the next world is purchased. But a deceased person cannot use wealth for his enjoyment in the proper sense of the term ;

therefore in his case, it is his spiritual benefit that is considered. This spiritual benefit consists in offering pinda to him ; also in making offerings such as he should have made, whereby he wins religious merit ; for it is his wealth which is employed in these offerings. Therefore, when there is no person who can offer pinda to him, which could be eaten by him, persons offering such pindas as he might make take his wealth. These are his maternal uncles and the like. After the exhaustion of all such persons, the sakulyas take. The sakulyas are the descendants of the great-greatgrandfather, that is, three generations upwards, from him : that is, counting him as the fourth, the descendants of the fourth, fifth and the sixth male ancestors in the paternal line are the sakulyas. The descendants of the 7th, 8th and all other ancestors upwards, as far as the pedigree can be traced are called the samanodakas ; they inherit after all the sapindas both on the paternal and on the maternal side have been exhausted, and also after all the sakulyas have been exhausted. A sapinda is thus defined in the Dáyabhága(11, 6, 19). He who has some connection with one identical pinda with the deceased, on account of his being the giver of the párvana pinda whether he be born in the family of the deceased, or not, and whether of the same gotra with the deceased or not, is a sapinda. Instances—own daughter's son ; father's daughter's son ; maternal uncle ; brother's son ; paternal uncle's son. And the number and quality of the pinda is the principle of preference mutually among the sapindas.

FUNDAMENTAL PROPOSITIONS OF THE DOCTRINE OF CAKES.

1. A male person offers cakes to his father, grandfather and greatgrandfather in the paternal line, and also to his mother's father, grandfather and greatgrandfather in the maternal line.

2. A is said to be sapinda to B if he gives pinda or cakes to B, if he receives cakes from B, or if both A and B give cakes to a common ancestor C.

RULES LAID DOWN BY DWARKA NATH MITTER.

1. AMONG Sapindahs, those who are competent to offer funeral cakes to the paternal ancestors of the deceased proprietor, are invariably preferred to those who are competent to offer such cakes to his maternal ancestors only, for the first kind of cakes are of superior religious efficacy in comparison with the second.

2. Those who offer a larger number of cakes of a particular description, are preferred to those who offer a less number of cakes of the same description.

3. Where the number of such cakes is equal, those that are offered to nearer ancestors, are preferred to those offered to more distant ones. (To which we must add.)

4. In counting the cakes, those given by a person to his mother's side are to be deemed of an inferior quality. Therefore a paternal G. F.'s Gr. Gr. son in the male line excludes a brother's daughters son, (23 W. R. 117).

In the absence of the Samanodakas, the spiritual preceptor takes; in his absence, the disciple; in his default, the fellow student; in his default, those of the same gotra; in their default, those of the same pràvara; in their default, the learned Brahmans; in their default, the King. But the Privy Council have held, that they are not bound to follow this part of the Hindu Law of succession; that the crown will take in absence of all persons related to the deceased. Therefore, the law actually administered is that after samanodakas, the crown takes (2 W. R. P. R. 59, 61). The wealth of a person retired into forest is taken by his fellow-religionist; that of a religious mendicant by his disciple; that of a life-long student by his fellow-students. The mohunts of this country are considered as jatis or religious mendicants of a degraded class. For this reason, their chelas become their successor; or rather the principal chela succeeds.

The chela is the disciple of the last Mohunt. But as the property of these mohunts generally consists of muths or religious endowments, the succession to them is governed by customary law. Sometimes, the last Mohunt appoints his successor; sometimes the Government; sometimes the mohunts of the neighbouring Muths assemble at the obsequial seremonies of the last Mohunt, (this ceremony being called the bhandara ceremony) and appoint his successor. Muths therefore are said to be of three kinds (5 C. L. R. 73). (1) Mourussee, (2) Hakimi, (3) Panchaiti. Mourussee is the same as hereditary, i. e. when the last Mohunt has himself appointed his own chela or successor. Hakimee is when the Hakim or Government appoints the successor. The Panchaiti is when the Panchait or an assembly of the neighbouring Mohunts met at the Bhandara ceremony appoint the successor. In each kind of Muths, however, it seems that the successor is appointed out of the chelas of the last Mohunt. It is generally known who is the principal chela and destined successor of a Mohunt before he dies. Whether it be Hakimi or Panchaiti, the Hakim or the Panchait generally follow the wishes of the last Mohunt as regards the appointment of his successor. They find out who is the principal chela, and they confirm him in the post, or the guddee as it is called. Whenever they disregard the wishes of the last Mohunt, disputes arise between the person appointed by them and the principal chela of the last Mohunt.

The following are some of the cases of succession decided by the tribunals under the Dáyabhága.

The rule in cases of inheritance is that the person to succeed must be the heir of the last full owner (3 W. R. P. R. 18.) In Bengal, (11 W. R. 470,) the sister cannot be the heir of her brother 5 W. R. 215. The grandson of the reunited brother, provided the reunion continued up to the time, excludes the grandson of the unreunited brother (5 W. R. 250.) Brother's sons take according to numbers, and not by representation as grandsons do; and they are totally excluded by the existence

of brothers. (9 W. R. 463.) In Bengal a male always takes a full estate subject to charges for maintenance and is always at liberty to alienate that by gift or sale. (11 W. R. app. or, 13, Kallydoss Doss.)

It is at variance with every principle of Hindu Law that an estate once vested in a male heir must be divested in favor of a nearer relative not in existence at the time of the ancestor's death. Id.

A person cannot succeed as heir, unless he is in existence; either in his mother's womb, or otherwise, at the time of the ancestor's death. Id. The son of a blind son born long after the ancestor's death, does not inherit a grandfather's estate vested in a qualified son of his. Id. B, a greatgrandson of R's, maternal greatgrandfather, is entitled to inherit from R. as his sapinda, 12 W. R. 339. Father's brother's daughter's son is a sapinda and an heir, 13 W. R. F. B. 49. If an heir is alive at the death of the female heir of the person to whom he is an heir, he takes the inheritance, 15 W. R. 433. Among sapindas, the nearer excludes the more remote, and a sister's son excludes another sister's sons, 15 W. R. 482. Reunion does not consist in men dwelling in the same house or commensality; nor in taking separate shares of profits, although no actual partition by metes and bounds has taken place. In every case of a proper reunion there must be an entire community of interest, and the whole income must constitute a single joint fund at the disposal of the whole family, 15 W. R. 442. Although commensality does not constitute a reunion, it is very good evidence of it. Where one brother separates, and the remaining brothers continue joint, that is a case of reunion, 15 W. R. 200. On the death of brothers of a joint family without issue, the sons of surviving brothers take *per capita*, not *per stirpes*, 18 W. R. 32. An unchaste daughter has no right to succeed to her father's property, 19 W. R. 349, Kerry Kolutany. Paternal grandfather's greatgrandson in the

male line excludes a brother's daughter's son, because funeral cakes offered thro' the paternal side are of superior efficacy to those offered thro' the maternal side. The difference of number of pindas is not a ground of exclusion, when the cakes are not of the same description. But there is an exception in favor of three daughter's sons specially mentioned in the *Dāya-bhāga*, 23 W. R. 117, Gobindoprosad Talookdar. In Bengal, illegitimate sons of Súdra do not inherit, but receive maintenance, 23 W. R. 337, Narain Dhara. The right to inherit their father's estate vests in the daughters jointly, and a right once so vested does not cease until her death, notwithstanding she subsequently becomes a barren or a sonless widow. When two daughters succeed to their father's estate, and one of them dies, leaving her sister a childless widow, the property survives to the sister, because like the widows, the two daughters collectively were, in a legal sense, one heir to their father, 23 W. R. 218. In Bengal, the brother of the whole blood succeeds, as well in the case of an undivided, as in the case of a divided estate, in preference to a brother of the half-blood, 24 W. R. 234, Rajkishore Lahiri. Reciprocal rights of inheritance are not any part of the Hindu Law of succession. Thus, a step-son may succeed to the stridhana of his step-mother; but a step-mother never succeeds to the property of his step-son, Sp. No. W. R. 124. Where a mother has succeeded, at her death, the sister's son to the last male person deceased, succeeds, provided he is in existence at the time, the mother's estate terminates, 1 W. R. 124. Inheritance cannot be suspended in expectation of the birth, at some future time, of an heir to the property, 1 W. R. 353. As for instance, because there is a sister, who may in future give birth to a son, the grandfather's descendants will not be excluded. An unchaste mother does not succeed, if she was unchaste before the son died, 2 Shoma's Reports 89.—Rampath Toloperthe, *vs.*, Durga Sundari Debya.—A father's brother's grandson in the male line is preferable in heir-ship to brother's daughter's son.

I. L. R. 4 cal. 411. In collateral heir-ship, descent must be strictly proved. I. L. R. 6 cal. 629. A nephew's daughter's son is preferable to an uncle's daughter's son, as he gives oblation to nearer ancestors. 10 C. L. R. 487. •

• So far as to succession under the Bengal Law. The succession under the Mitákshará begins to differ from the Bengal Law, with the widow. In Bengal, the widow succeeds whether the husband died divided or undivided; but elsewhere the widow succeeds if case the husband died in a divided and unreunited condition; otherwise, the share of the husband in the joint property passes to the coparceners, *i. e.*, either to the father or uncle or brother or uncle's son or any person of the same family and gotra, with whom or with whose ancestor, the deceased or his ancestor had been joint, and no division had ever taken place. But the Privy Council have ruled in Kattama Natchiar's case (2 W. R. P. R. 31) that if the deceased had both joint property and separate property, his separate property is taken by the widow; the joint property by the coparceners. Where the deceased died joint, and left son' grandson or greatgrandson, these latter simply step into his position, and at a division, take what the deceased would have taken. The estate of the widow under the Mitakshara is of the same kind as under the Bengal Law; viz., a restricted and qualified estate of inheritance; so far so, that even when there are no reversionary heirs, the crown can prevent her making alienations (Collr. Masulipatam, *vs.* Cavalý Venkata Narain Appa 2 W. R. P. R. 61.) As regards daughters, first a maiden succeeds; in her default, the married indigent daughter; in her default, the married wealthy daughter. Barrenness or widowhood or giving birth to female children alone is no cause of exclusion. In default of daughters, the daughter's sons succeed per capita. Then the mother, the reason assigned

for mother's superiority to the father is that in a country where widow marriage never actually prevailed among the respectable classes, whatever the law may be, the father is a common father of step-brothers also; but the mother cannot be so, therefore the mother is nearer in closeness of relationship than the father. Nearness of relationship under the Mitákshará depends not upon oblations so much, as upon consanguinity. This rule of consanguinity determines the right of succession both among sapindas and among Samanodakas. Consanguinity consists in having the particles of the same identical body. Thus two brothers are said to have the particles of the father's body. A son is said to have the particles of grandfather's body through the father; and so on. In default of mother, the father succeeds; in his default, the brothers; among brothers, first the full-brothers succeed; then the half-brothers. In default of all brothers, the brother's sons succeed in the same way; first full-brother's sons; then half-brother's son. Under the Mitákshará, no complication on account of non-divison or re-union can arise. For then, there is no succession, but survivorship: *i. e.*, whatever interest the deceased had in the joint or reunited estate, survives to the undivided or reunited coparceners. But if one dies leaving his brothers B. C. D. as heirs; and before division of the property, B. dies leaving E. F. his sons; in such a case E. F. together get $\frac{1}{3}$: in analogy to the principle of representation. In default of heirs as far as the brother's sons, the heirs are persons known under the general name of the gotraja, 'gootia' in vernacular, *i. e.*, persons born in the same family, literally. But this literal meaning is not the legal sense of the word; for in the Mitákshará, paternal grandmother is named as the first gotraja; she evidently is not born in the same family. The other gotrajas are named as the sapindas and the samanodakas. Therefore after the brother's sons, the paternal grandmother succeeds; in her default, the paternal grandfather; then paternal uncles; then their sons; in their

default, paternal greatgrandmother; then paternal greatgrandfather; and then their descendants: in this way, sapindas of the same gotra succeed as far as the seventh generation; it is at the seventh generation, that the sapinda relationship terminates; unlike the Dáyabhága, where it terminates at the fourth. When no sapinda relations exist, the patrimony goes to the Samanodakas, that is, male relatives of the same gotra, whose relationship can be traced. After the samanodakas, the Bandhus succeed: the definition of a bandhu is,—a person who is a relative belonging to a different gotra: instances,—mother's brother, mother's sister's son, maternal uncle's son, and so forth. There is a smṛiti text which runs thus:—"One's own mother's sister's sons, own father's sister's sons, and own maternal uncle's sons, are termed 'own bandhus.' Father's mother's sister's sons, father's father's sister's sons, father's maternal uncle's sons, are termed father's bandhus; mother's mother's sister's sons, mother's father's sister's sons, mother's maternal uncle's sons, are termed mother's bandhus." Formerly, this text was considered to be an exhaustive list of the relatives called the Bandhus. But the Privy Council decided in the case of Giridhari Pál (10 W. R. P. R. 33) that the list of 'bandhus' in Sec. 6, Ch. 2, Miták. is not exhaustive, but simply illustrative, of the proposition that 'bandhus' are of three classes. 'Bandhus' are kinsmen springing from a different family and connected by funeral oblations. By this decision, not only the maternal uncle's son, but also the maternal uncle himself is a 'bandhu' and succeeds as such. It ought to be borne in mind here that in the Sanscrit Mitákshará, the definition runs thus:—A bandhu is a sapinda of a different gotra; the Privy Council have translated this by saying—'Bandhus are relatives springing from a different family and connected by funeral oblations.' Now, in the Bengal School, no doubt, the word 'sapinda' would be properly translated by saying that they are relatives connected by funeral oblations. But in the Mitákshará, the definition of a sapinda is, as we

have seen above, a relative within seven generations either on the paternal or on the maternal side, whether of the same gotra, or not of the same gotra. Therefore, a bandhu under the Mitákshará is a relative within seven generations, either on the paternal or on the maternal side. The order of succession among the bandhus is—1st, one's own bandhus, then father's bandhus, then mother's bandhus: when a competition arises among bandhus of the same class, he who is nearer in point of consanguinity excludes one more remote; thus, a maternal uncle would exclude a maternal uncle's son. In default of 'bandhus,' it is the Acháryya who succeeds. This word is sometimes translated as 'a spiritual guide', sometimes as 'a preceptor.' But the real meaning of the word is, so far as the Brahmins are concerned, the person who teaches the Gáyatri, performs the ceremony of the investiture with the sacred thread, and then teaches the Veda and its ancillary branches of learning. There can therefore be no Acháryya, except for a person of the three regenerate castes. A Súdra has no Gáyatri' and no Acháryya. As regards a spiritual preceptor, or Guru as he is otherwise called, he is a person who teaches some sacred formula in accordance with the teachings of the Tantra works. Now, these Tantras have silently inaugurated a new religion altogether distinct from the ancient Brahmanic religion, and utterly ignored by the ancient sacred writings. Therefore a Guru according to the Tantric form would not have a right to succeed according to the Smriti works. But as the word Acháryya occur in a text which lays down the law for all the classes, and as the Tantric Guru performs the same spiritual ceremony for a Súdra which an Acháryya in the proper sense of the term performs for a Brahman, it would seem that the only law to lay down upon the subject should be, that 'as regards a Brahman, or a Kshatriya or a Vais'ya, the person who invested the deceased with his sacred thread would be the heir in default of blood-relations; but as regards a Súdra or a woman, the Tantric Guru would be the

proper person to succeed in default of blood relations. In default of an Acháryya or a Guru, the disciple succeeds. In default of a disciple, a fellow-student, or rather a person who has had the same Acháryya or the same spiritual guide or Tantric Guru. In default of a fellow-student, if the property be that of a Brahman, it does not escheat to the king, but learned Brahmins, who know the three Vedas, who are of good morals, and who have control over their senses, are the heirs. In default of such Brahmins, the property of a deceased Brahman goes to to any Brahman, whether learned or not. Upon this matter. the Privy Council have recorded the following observations, in Collector of Masulipatam *vs.*, Cavalry Venkata Narain-Appa, 2 W. R. P. R. 59. "The important passages connected with this subject are Articles, 3, 4, 5, Ch. 2, S. 7, Mitákshará. From these it would appear that the beneficial enjoyment of a Brahman's property ought not, on his death without heirs, to pass to the king; that it ought in some way or another, to pass to other Brahmins. But the texts also shew that it is not to pass to Brahmins generally, or even to any definite or well-ascertained class of them. But the persons to take the beneficial interest are to be Brahmins having certain spiritual qualifications; they are to be pure in body and mind, and are to have read the three Vedas. If this be the law, it seems to imply a power of selection; and a right of possession, at least intermediate, of property in some body. It cannot be supposed that the first Brahmin who could lay hands upon the property of a member of his caste dying without heirs, was to hold it, subject, perhaps, to the condition of showing that he possessed the personal qualifications which the law requires. The passage quoted in the Miták. from Nárada in the very Sec., which cites the prohibition of Manu shews what the law in its utmost strictness was. That passage is:—'If there be no heir of a Brahman's wealth, on his demise it must be given to a Brahman, otherwise the king is tainted with sin.' In other words, the king

is to take the property, but to take it, subject to the duty, which he cannot neglect without sin, of disposing of it at his discretion among Brahmins of the kind contemplated by the preceding texts. If this be so, then, according to Hindu Law, the title of the king by escheat to the property of a Brahmin dying without heirs, ought as in any other case to prevail against any claimant who cannot show a better title: and that the only question which arises upon the authorities is, whether Brahmanical property so taken is in the hands of the King, subject to a trust in favor of Brahmins. **** According to the law administered by the Provincial Courts, British India, on the death of any owner, being absolute owner, any question touching the inheritance from him of his property is determinable in a manner personal to the last owner. This system is made the rule for Hindus and Mahomedans by positive regulation: in other cases, it rests upon the course of judicial decisions. But when it is made out clearly that by the law applicable to the last owner, there is a total failure of heirs, then the claim to the land ceases (we apprehend) to be subject to any such personal law; and as all property not dedicated to certain religious trusts must have some legal owner, and there can be, legally speaking, no unowned property, the law of escheat intervenes and prevails, and is adopted generally in all the country alike. Private sonnership not existing, the State must be owner as the ultimate lord. If the Hindu Law had expressly provided that upon the death of a person without heirs, ordinarily so called, his property should pass to some definite person or class of persons; if for instance, it admitted, in the case of a Brahminical succession, collaterals more remote, than it would admit in case of succession to a Súdra, there would be ground for excluding the title of the Crown; because there would, by Hindu Law, be some person in the nature of an heir capable of succeeding. But where Hindu Law says that the property of a Brahmin shall never be taken by the King: it does so in connection with another

proposition which it lays down, that the wealth of all other classes of persons should be taken by the King, on a complete failure of all heirs whatsoever. But here the Hindu Law is in denogation of the general right of the 'British' sovereignty. Their Lordship's opinion is in favor of the general right of the Crown to take by escheat, the land of a Hindu subject, though a Brahman, dying without heirs." The sum and substance of this decision by the Privy Council is that in determining the questions of succession among Hindus, the Hindu Law is to be disregarded where it derogates against the rights of the Sovereign by escheat; so far as that law assigns the right of succession to a relative of the deceased, the law is valid; but where it assigns it to a stranger, the general law of escheat steps in, and vests the right in the king. This is so, because the sovereign is a person not bound by conscience to obey Hindu Law. If the sovereign had been a Hindu one, there is no doubt that the Brahman's property would have never been allowed to escheat to the king. The Privy Council seem to allude to the inconvenience that would ensue if the law were that Brahmans learned in the law had a right to succeed on failure of all relatives. They say that the property would be liable to be laid hold of by any Brahman on the death of a Brahman without heirs. But this inconvenience is more apparent than real. No doubt when there are no heirs, the property of a Brahman is to be taken possession of by the king. But he may then distribute it among Brahmans who are qualified. This probably would be the law administered by the feudatory Hindu Kings.

The law under the Mitákshará with regard to the property of a dweller in the forest, a religious mendicant, a life-long student is the same as that under the Dáyabhága. Under this law also, students are of two classes, the first is called an Upakurvana, who remains in the house of his preceptor till he attains the marriageable age, when he marries and sets up

as a house-holder. A life-long student, called a Naishthika in Sanscrit, is one who has taken a vow of celibacy, and intends to pass the whole of his life in the house of his preceptor. If an Upakurvana dies, while in the student stage, his property is taken by the ordinary heirs, viz., mother, father, brothers, &c. But if a Naishthika or life-long student dies, his property is taken by his preceptor, in whose house he is residing. The property of a religious mendicant is taken by a virtuous disciple; by 'a virtuous disciple' is intended one who, as the Mitákshará says, is 'capable of hearing, understanding and following in practice the instruction of the writings which deal with the nature of the soul.' Then the Mitákshará adds that a vicious preceptor, &c., are incapable of getting a share. Here therefore is a clear proposition of law laid down by the highest authority of the Benares School, that it is not every disciple, but it is a qualified disciple who ought to succeed to the property of the religious mendicants or 'yatis.' Now, the Mohants who are the Superintendents of a vast number of Hindu religious endowments are regarded as a class of 'yatis,' however repugnant their actual life and conduct may be to the rules that ought to guide the lives of 'yatis.' The late Hon'ble Prasannakumár Tagore on one occasion expressed his opinion to be that those Mohants are corrupt or degraded 'yatis.' Therefore it is clear that if any part of the Hindu Law of succession is to be applied to them, it is the part which speaks of the 'yatis'. that being so, a conscientious working of that passage of the Mitákshará (2, 8, 4) which declares only a virtuous disciple to be entitled to succeed to a 'yati,' and which also says what are the qualifications of such a disciple,—would disinherit three-fourths of the Mohants who now own or superintend Muths throughout India. Most of them lead a life of utter depravity, are utterly unlearned, and have been elected to their sacred post, simply because they were the favorite illegitimate children of the

previous incumbent. But I believe the hands of the tribunals are tied, as the Mohants take shelter under customary Law; they say that they are governed by spécial customs, and that these customs are known only to the Mohants of the neighbourhood. And as most of them are on a par in matter of private morals, it would of course be difficult to prove a custom which would brand immoral life as a disqualification for occupying the guddee of a Mohant.

ON REUNION ACCORDING TO BENARES LAW.

Reunion is said to consist in the mining together of property belonging to two or more persons, after they have once separated. This reunion can take place only with a father, a brother, or a paternal uncle. Now the first rule with regard to reunion is, that if a reunited person dies, and if it so happens that when the separation took place, it was not known that his wife was pregnant, and if a son is born after the separation, that son receives his father's share from the reunited coparcener; if no such son is born after the separation, then the reunited coparcener, whoever he may be, whether a father, an uncle, or a brother, will succeed to the reunited property, in exclusion of wife and daughters, &c. The 2nd rule is that if both a brother of the whole blood and a person who is not so were reunited with the deceased, then the reunited whole brother will take in exclusion of every body else; excepting only a subsequently born son; the 3rd rule is, that if there is an unreunited whole brother and a reunited person of any other kind, then the two together take the property of the deceased in equal shares. It is not quite clear from either the *Mitāksharā* or the *Vīramitrodaya*, what the rule should be, in the case of there being a reunited father and also a reunited whole brother. But I apprehend that if we confine our attention to the strict sense of the text of *Yājñavalkya*, we ought to hold that the whole brother will exclude the father. The *Mitāksharā*

quotes a text of Manu which says, that if there be a number of brothers, living in reunion, and one of them dies, then, when a fresh partition takes place among the survivors, the share of the deceased reunited brother is to be divided by reunited whole brothers, by whole sisters, and by reunited half-brothers. According to the Viramitrodaya, a coparcener who has taken the property of a deceased reunited coparcener, should give maintenance to the widows of the deceased out of his property, also to his unmarried daughters, and should supply their marriage expenses. This maintenance of the widows is conditioned upon their remaining chaste, and unchastity on their part would forfeit the right to maintenance.

The following are some of the cases with regard to the Benares Law of succession. There is hardly any difference between the Benares and the Mithilá Law of succession.

A brother's grandson in the male line is an heir, altho' not enumerated by name in the Mitákhará. Karimchand, 6 W. R. 158. In a joint estate under the Mitákshará Law, a maiden daughter does not succeed to the estate of her father, in preference to her paternal uncle, 6 W. R. 197, Muss. Tulsi. The paternal grandmother is the first person of the gentile or 'gotraja' class of heirs who take the estate, 7 W. R. P. R. 26, Thakurain Sahiba. According to the peculiar doctrine of the Benares School, the remotest relative in the agnatic line ('gotraja') is placed above the highest of the cognates or the Bandhus, 10 W. R. F. B. 88. Amrita kumári. A sister's son, or a father's maternal uncle are bandhus, and as such are entitled to inherit in preference to the king, who cannot take in prejudice of the maternal uncle or the maternal granduncle, 10 W. R. P. R. 23, Giridhári Lal. Un-

der the Mitákshará Law, if there be no kindred belonging to the same general family (gotra) and connected by funeral oblations, the succession devolves on kindred connected by libations, 11 W. R. 500, Muss. Digdayi. Where the property is held jointly, it is a rule of the Miták. Law, that the widow and the daughter do not succeed, 12 W. R. 453, Kulodá Debyá. Sec. 5, Ch. 2, Miták., does not contain an exhaustive enumeration of the gotrajas, but only a statement of the order in which they would inherit, and does not therefore limit the inheritance to the grandsons of the paternal grandfather and the paternal greatgrandfather. Both in the Mithilá and in the Benares Law, the gentiles must be exhausted before the cognates come in. Upon this point, there is no difference between the two schools, 14 W. R. 117, Thacoor Jeebnath Sing. A brother's grandson in the male line is an heir under the Mitákshará Law, 14 W. R. 208, Muss. Ojha Kooer. Under the Mitákshara Law, a great-great-greatgrandson of a common ancestor is not excluded from inheriting as a gentile to another great-great-greatgrandson, on the ground that he is too remote in descent from the common ancestor. The Hindu Law contains in itself the principles of its own construction. The Digest Mitákshará subordinates in more than one place the language of the texts to custom and approved usage. Nothing from any foreign source should be introduced into it, nor should Courts interpret the texts by the application to the language, of strained analogies. The Miták. in the 5th and 6th Secs. of the 2nd Ch. recognizes two successive classes of heirs, 1st gentiles; next, bandhus; after them, it places certain special persons; and after these last, the state, the *ultimus haeres*; whatever descent prevails, and even when the state takes by escheat, the duty of some ceremonial performance to the deceased is still enjoined. The family is the cherished institution of the Hindoos; and individual, separate ownership is less the subject of the general remarks of the commentators on the Hindu Law, than the associated aggregate community,

the family. In this respect, an analogy is observed between the family ownership, and that of the old village community. Consequently, family union or connection derived from a common head, the founder of the family, may be reasonably regarded, amongst a patriarchal people, as the source of the entire class, from which a succession of heirs may be derived. Again, as males are preferred to females, in succession, from religious reasons, this same class may be reasonably subject to the condition that the descent be generally derived from males, who for the same reason may obtain a constant preference. The text of the whole of the 5th and 6th Secs. of the 2nd Ch. of the *Mitákshará*, is in the strictest conformity to these principles. The gentiles or the *gotraja*, from the *gotra*, are described as descending from one common stock, a male, and derived generally through males as forming a family, though embracing possibly many families, and such original bond is regarded as necessary to the constitution of the *gotra*. The conditions are all that are stated as necessary to the constitution of the class of gentiles. As regulating preference of succession amongst them, the law of succession among gentiles classifies them further as *sapindas* or *samanodakas*. The first it treats as prior to the second, but excludes neither, within limits wide enough to include the 5th in descent from the common ancestor. When a question of preference arises, as preference is founded on superior efficacy of the oblation, that principle must be applied to the solution of the difficulty. It obtains properly when a succession opens to the deceased, when the question mooted is a real one (at least in the contemplation of pious Hindus), viz., who best can confer on the deceased and his ancestors the benefits which the grades of oblations offer in different degrees. When no sexual or personal incapacity exists, no ground of entire exclusion from inheritance exists, if the opposing parties confer inferior benefits, or benefits of equal degree only. In such a case, what reason could justify sentence of exclusion from inheritance on a claim to

put limitation on language which declares the whole class heritable, and not simply some persons found in it? Where all the contending kindred are in an equal degree remote, and where the benefits conferred are equal, though slight, the principle of selection founded on superior efficacy is inapplicable to the solution of that question of precedence. Bandhus do not inherit till those on the father's side to the seventh degree have been exhausted. The method of arriving at the seventh person is to take six degrees in the ascending line. The Pundits may be taken to be fair exponeats of the views of the Hindu people on subjects connected with the Hindu Law. The compiler of the Mitákshará is said to have been an ascetic or devotee, and from that source nothing at variance with the religion of the Hindus, is likely to have flowed, 14 W. R. P. R. 1, Bhyaram Sing. A nephew succeeds, under the Mitákshará, not as heir of his father, but as direct heir of his uncle, 15 W. R. 70, Brojomohon Thacoer. Under the Mitákshará, if an unmarried daughter succeeds to the property of her father in preference to her married sister, and then dies leaving a son and the said sister, it is the sister, and not the son who succeeds to the property. Although there is nothing in the Mitákshará which restricts the right of the widow in her husband's property or of the daughters in her father's, yet according to the principle of the decided cases, it must be held that the daughter's estate under the Mitákshará is of the same character as that of the widow is, 22 W. R. 55, Dowlut Kooer. Under the Mitákshará, one's own sister's son is preferable as an heir to his mother's sister's son, it being so decided according to the general principles of spiritual benefit, of which a sister's son can confer a greater amount than the mother's sister's son, this principle being followed in the case, because the Mitákshará is silent upon the respective position of these parties.—22 W. R. 264, Ganeschandra Roy. Property inherited by a Hindu woman from her father does not under the Mitákshará Law, on

her death, descend to her heirs, but reverts to the nearest heir of her father.—22 W. R. 296, Chotay Lal. Under the Mitákshará, a bandhu or a cognate can not take so long as there is either a sapinda or a samanodaka in existence, 23 W. R. 410, Thacoor Jeebnath Sing. A step-mother under the Mitákshará Law has no right to succeed to the property left by her step-son, inasmuch as the word 'Mátá' in para 1, Sec. 3, Ch. 2, Miták. does not include a step-mother, as appears from the two following paras which give reasons for mother's preference to the father as an heir. But in the case of partition, the word may or may not include a step-mother, Sp. W. R. 173—Lalla Jotilal. The word 'Sápinda' in verse 3, Ch. 5, S. 2, Mitákshará, is used not in the sense of connection by funeral oblations, but of connection by particles of one body as defined in the Achárakánda: and the sister's daughter's son is a sapinda and is entitled to inherit, I. L. R. 6 Cal 119, Umed Bahadur v., Udoichand. Under the Mitákshará Law, a daughter-in-law whose husband has predeceased his father, is not in the line of heirs; nor can she succeed to the property of her father-in-law by right of survivorship, as she cannot be said to be a joint owner with her father-in law. Ananda Bibi v., Nownitlal, I. L. R. 9 Cal. 315.

ON ADOPTION.

The word 'adoption' means an act by which a person who is not a son or a daughter obtains the status of being a son or a daughter to another person. Adoption and affiliation are synonymous terms. The Rishi Atri is the authority who says that it is competent only to a sonless man to perform such an act. The purport of his text is—that it is the duty of a sonless man to take a substitute for a son, in order that his oblations and libations may not fail. Another purpose for

which an act of adoption is said to be necessary is that the name of the person who adopts may not cease to be celebrated from time to time, which means that his race may be perpetuated. Modern commentators have explained Atri's text by saying, that not only must a son be absent, but there must also be a default of grandson and greatgrandson in order that the right to adopt a son may accrue. In former times 12 forms of adoption prevailed. But in the Kali age only the dattaka and the kritrima are allowed. According to the definition of Manu, a dattaka son is one whom either his father or his mother or both together give to another person of the same caste, to be the latter's son, from motives of affection. The act of gift is confirmed or made patent by sprinkling of water, which is a ceremony inseparable from all acts of gift of whatsoever articles. The purport of Manu's definition is that the dattaka or the given son must not be confounded with the Krita or the bought son of the former ages. A bought son was affiliated by paying money to the natural father; therefore in the affiliation of a bought son, motives of affection or friendship between the natural and adoptive parent had no operation. Whereas in the dattaka form of adoption, the natural parent sees that another person for whom he entertains regard and friendship is sonless, and he can spare his own son to be given to him for a son, and so he gives—these are the essentials of a dattaka form of adoption. A kritrima or a made son is where the adoptive parent makes the affiliation without consulting the natural parents; which may take place when the son is an orphan. It is doubtful whether an orphan can be adopted in the dattaka form. The kritrima form of adoption prevails only in the District of Tirhoot or Mithilá. It is not allowable for a female to adopt a dattaka son unless with the consent of her husband. If such a consent is given the son adopted is affiliated to both the husband and the wife.

In Bengal, a widow may adopt if her husband has left a consent, written or verbal. This consent is called an *anumati*, and

when written, the instrument is called an *anumatipatra*, i. e., an authority to adopt a son. Under the present Registration Act, viz. Act 3 of 1877, it is provided that all such authorities executed after 1st Jan. 1872, and not conferred by a will, must be registered. But the kritrima adoption may be made by a female independently of her husband, and the son is affiliated solely to herself. Similarly a male person may adopt a kritrima son; the son thereby does not become the son of his wife. A kritrima son is called a 'kartaputtra' in the vernacular. With regard to the dattaka form of adoption, there are certain rules as to the qualifications of the son to be adopted. The first rule is that the son to be adopted must be of the same caste with the adoptive family. Again, he must not be the only son of his natural parent. Formerly the idea was that he must not also be the eldest son of his natural father; but it has been held in the case of *Jánokee Dabee, v., Gopal Acharyya*, I. L. R. 2 Cal. 365, that the prohibition of the adoption of an eldest son, unlike the prohibition of the adoption of an only son, is simply admonitory, and does not create a legal restriction. The adoption of an eldest son is prohibited only in the *Mitákshará*, but the *Dattaka Chandriká*, which is a special authority for Bengal, and the *Dattaka-mimánsá*, which prevails in the *Mitákshará* provinces, are both silent as to the adoption of an eldest son. The adoption of an only son is prohibited, because the giving away of an only son causes the extinction of the line of the natural father. This rule therefore has been held to be imperative, and it has been decided that the adoption of an only son is invalid in law. *Manick-Chunder Dutt, v., Bhogobutty Dossee*, I. L. R. 3 Cal. 443. Another rule with regard to the dattaka adoption is that the son to be adopted must bear the reflexion of a son to the adoptive father. This has been interpreted to mean that the natural mother of the son to be adopted must not bear such a relation to the adoptive father, that any marriage between them would be invalid in the eye of law. Thus a sister's son

cannot be adopted by a brother, because there can be no marriage between a brother and a sister. But in the case of *Hárán Ch. Banerji, v., Hurromohon Chukravarti*, I. L. R. 6 Cal. 41, the judges say :—"The rule deduced from D. M. Sec. V. Para: 20; D. Ch. S. 2, paras: 7, 8, that a person cannot be validly adopted with whose mother the adoptive father might not have lawfully intermarried while she was yet unmarried, does not prevent the adoption of a cousin's grandson." Then the judges enter into a discussion of the meaning the words 'reflexion of a son,' in the passages of D. M. and D. Ch. referred to above. The rule however has some exceptions with regard to the *Sùdras*, amongst whom it is allowable to adopt a daughter's son, a sister's son, or the son of a maternal aunt; for there is an express text sanctioning such adoptions in the case of a *Sùdra*; from which it necessarily follows that such adoptions are not permissible among the three superior castes. There are passages in the *Dattaka Mim.* to the effect that proximity of kindred ought to determine the choice of the son to be adopted. Thus *Nanda Pandita* in Sec. 2 of D. M., tries to make out that if there be a brother's son, he ought to be first adopted; then other *sapinda* relatives in accordance with the proximity of relationship. But this rule of preferential right to be adopted, grounded on the fact of near relationship, has been disregarded by case law. Thus in the case of *Gocoolanand Das, v., Musst. Omabutty*, 23 W. R. 340, it is said that when an only son of a brother exists, he may be adopted as a son: but the provisions of Hindu Law with reference to this point are only intended to authorize the adoption of an only son, not to restrict the selection to him alone. The choice of the party to be adopted is legally free with the adopter, and in practice adoption often takes place of persons who are directed in books of Hindu Law to be postponed to persons who are stated to be preferable to them. The adoption of a *sagotra-sapinda*, that is, one related within seven generations of paternal ancestors with-

out the intervention of a female, is supposed to be preferable. Nevertheless the adoption of any person not related by blood, nor of the same gōtra, but simply of the same caste, is quite valid in the eye of law, although relatives may be existing. In the case cited above, we have seen mention of a son called a Dyāmushyáyana son. This word means a son belonging to two persons, that is, who is destined to offer oblations and libations to two persons as his fathers, and who in consequence inherits the wealth of both. Such a son occurs when a brother adopts the son of his brother, upon that understanding. Here, the general prohibition against the adoption of an only son is relaxed, because the reason for that prohibition has no operation in the case. That reason is that the line of the natural father will fail if an only son were allowed to be given in adoption to a stranger. But as the lines of two brothers are identical, there is no failure of the line of either if one brother adopts the son of another brother as a Dyāmushyáyana son. These sons however are rarely found in actual usage. There are certain rules with regard to the giving of an adopted son. The natural father can always give his son in adoption, provided it be not an only son. The natural mother of the son to be adopted can give him with the consent of his father: and she can do so without such consent, if she be a widow. She cannot do so, if the husband has left a direction prohibiting the gift of the son in adoption. This is the difference between the matter of giving and the matter of taking. In Bengal, the widow cannot take unless the husband has left an express permission; but the widow can give unless the husband has left an express prohibition; the rule applied in the latter case being, that the absence of prohibition implies consent. But this rule is not applied to the matter of taking a son in adoption by the widow. The necessity for taking permission of the husband when a son is given or taken in adoption by a woman is founded upon the following words in the text of Vasistha. "A woman

should not give or take a son in adoption." This text of Vasishtha has been thus construed by D. Ch. in paras. 31 &c., Sec. I. "But by a woman, the gift may be made with her husband's sanction, if he be alive, or without it, if he be dead, or emigrated, or entered a religious order. Accordingly Vasishtha—'but let not a woman, either give or receive a son, unless with the assent of her husband.' Now, if there be no prohibition even, there is an assent, on account of the maxim: 'The intention of the other, not prohibited, is sanctioned.'—Yājñavalkya suggests the independency of the woman.—'He, whom his father, or mother, gives, is a son given.'—Also in another place, "deserted by his father and mother, or either, of them." This is said with regard to the act of giving; though Vasishtha's prohibition is found to be propounded with regard to both giving and taking in the same breath. In the case of *Tárinicharan Chowdry, v., Saradā Sundari Dāsi*, 11 W. R. 476, the Judges say that verses 31 & 32, Sec. I, D. Ch. relate to, not the permission given by a husband to *adopt* a son, but to the fact of a woman giving a son in adoption." With regard to the matter of taking a son in adoption, by a woman, we have seen that in Bengal, a widow can adopt only where there is an express sanction left by her deceased husband. But the Benares Law differs widely from it. In the Privy Council case, *Collector of Madura, v., Muthu Ramalinga*, 10 W. R. P. R. 24, the law upon the subject has been thus laid down. "According to the doctrine of the Benares, Moháráshtra and Drávida Schools, a Hindu widow can adopt a son without her husband's express authority, if the adoption be made with the consent of her husband's kindred. In an undivided family, if the father-in-law be alive, his consent is sufficient for the widow to justify her to adopt. If he be not alive, then the consent of all the brothers, who, in default of adoption would take the husband's share, would probably be required. But where the estate of the deceased husband has been separate, the consent of every kinsman, however remote,

is not essential. The assent of kinsmen is required by the presumed incapacity of women for independence, rather than the necessity of procuring the consent of all those whose possible and reversionary interest in the estate would be defeated by the adoption. In the case of a separate estate, also, the consent of the father-in-law is sufficient. But where he is not in existence, no inflexible rule can be laid down, every such case must depend upon the circumstances of the family. All that can be said is that there should be such evidence of the assent of kinsmen as suffices to shew that the act is done by the widow in the proper and *bond fide* performance of a religious duty, and neither capriciously nor from a corrupt motive. The rights of the adopted son are not prejudiced by any unauthorized alienation by the widow which she makes, and tho' gifts improperly made to procure assent might be powerful evidence to show that no adoption was necessary, they do not go to the root of the legality of an adoption. Again, inasmuch as the authorities, in favor of the widow's power to adopt with the assent of her husband's kinsmen, proceed in a great measure upon the assumption that his assent to this meritorious act is to be implied whenever he has not forbidden it, so the power cannot be inferred if the prohibition by the husband has been either directly expressed by him, or can be reasonably deduced from his disposition of his property, or the existence of a direct line competent to the full performance of religious duties, or from other circumstances of his family, which afford no place for a supersession of heirs, on the ground of religious obligation to adopt a son, in order to completely fulfil defective religious rites." With regard to the age before which the child is to be taken in adoption, the law is not yet settled. But the prevailing opinion seems to be this. In Bengal, a son may be adopted before his Upanayana ceremony has been performed by the natural father. This of course relates to the three superior castes. Among Súdras, a son may be adopted before his marriage has taken

place in the family of his natural father. In the Benares Law, however, the ceremony of tonsure marks the period before which the son must be adopted by a person belonging to any of the three superior castes; whilst among the Sudras, the son must be adopted before he has been married in the natural family.

ON THE FORMALITIES TO BE OBSERVED WHEN MAKING AN ADOPTION.

Adoption, like marriage, requires certain formalities to be observed, which stamp upon the person to be adopted the status of being the son of another, who is not his natural father. There are three Rishis who have described those formalities, viz., Baudhayana, Saunaka and Vasishtha. The formalities are that there must be a gift by the natural father of the son to be adopted, an acceptance by the adoptive parent, such adoptive parent being either the adoptive father, or the adoptive mother who has received a sanction for that purpose from her husband, living or dead. The other formalities are (1) that information should be given to the king or the ruling power; and if the ruling power be at a distance from the locality where adoption is taking place, then the information should be given to the proprietor of the village in which the adoption is taking place, whereby no doubt are meant the local authorities appointed by Government, such as a Collector or Magistrate of the District under the British Government. Then (2) there must be a gathering of friends and relatives at the ceremony of adoption. (3). A solemnity known by the name of *dattahoma* or a particular burnt sacrifice. (4) the recitation of certain prayers or hymns of the Veda. (5) where the son to be adopted has had the ceremony of tonsure performed in his natural family, then a particular ceremony, called the *putreshti* sacrifice, should be performed in the adoptive family. With

regard to the question, how far the observance of these formalities is essential to the validity of an adoption, the following are the observations made by the Privy Council in the case of *Sutthrooghun Suthputty v. Sabitrí Dayee*, 5 W. R. P. R. 109: "Neither registration of the act of adoption, nor any written evidence of that act having been completed, is essential to its validity. Neither written acknowledgements, nor the performance of any religious ceremonies, are essential to the validity of an adoption; but such acknowledgments are usually given, such ceremonies observed, notice is given to the king of the time when the adoption takes place, in all families of distinction, such as those of Zemindars and opulent Brahmans. Whenever these have been omitted, the proof offered in support of the adoption ought to be regarded with extreme suspicion. In no case should the rights of wives and daughters be transferred to strangers or to more remote relations, unless the fact of adoption be proved by evidence free from all suspicion of fraud, and so consistent and probable, as to give no occasion for doubt of its truth." In the Full-Bench case of *Beharilal Maulik, v., Indurmoney*, 21 W. R. 286, the question was, whether amongst the Súdras in Bengal, in addition to the giving and taking of the child in adoption, any, and if any, what ceremonies are necessary to make a valid adoption; and if any ceremonies, at what time ought they to be performed? The conclusion at which the Full-Bench of the Calcutta High Court, arrived was that no ceremonies, besides the giving and taking of the child in adoption, were necessary to give validity to an adoption in the Sudra families of Bengal. The conclusion was based upon the following passages of the *Dattakamīmāṃsā*. Verse 24, S. I. "It must not be argued, that since under a text of Saunaka, the employment of a priest is in accordance with the approved doctrine, the homa may be completed by his intervention; for, although that were complete, still would the adoption (by the woman) be imperfect, since she is not competent to perform the prayers requisite for the

same." Verse 26. "Nor does then the want of power of Sudras follow, for their ability to adopt is obtained from an indication of law conclusive to that effect in this passage :— 'Of Sudras from among those of the Sudra class.'—By this, Vāchaspati is refuted, who says:—Sudras are incompetent to affiliate a son, from their incapacity to perform the sacrament of the *homa* and the prayers prescribed for adoption.' Verse 27. "Therefore, since by this passage,— 'Of women and Sudras without prayers'—a dispensation with respect to prayers is established, the adoption of the women in question would be valid without prayers, like their acceptance of any chattel." Sec. V., verse 56.—"It is therefore established that the filial relation of the adopted is established by the proper ceremonies : Of gift, acceptance, a burnt sacrifice, and so forth, should any be wanting, the filial relation even fails." 'The Full-Bench also cite verse 29, Sec. V., where it is said that a Sudra ought to bestow "the whole even of his property; if indigent, to the extent of his means;" by way of gratuity to the priest who performs the ceremony of adoption for him. From a consideration of all these passages taken together, the Full-Bench have concluded, that the *homa* and the prayers use indispensable where there is a capacity for performing them. That they are not necessary where there is no capacity to perform them. The judges say that this must have been the intention of the author of the D. M. To ascribe any other intention to him would make the author absolutely contradictory. In one part of his work, he would be saying that a Sudra can adopt, and in another, that an adoption by a Sudra is invalid, because ceremonies have not been performed which he was incapable of performing, and which the author had said he was exempt from performing. In arguing thus, the judges overlook the text which they themselves quote, which says that a Sudra should give half his property as the gratuity to the priest who has performed the ceremonies of adoption for him. From this text it appears, that though a Sudra could not himself

perform the ceremonies, or to use the words employed by the Judges of the Full-Bench, that though a Sudra was incapacitated from himself performing the ceremonies, yet he had capacity to employ a priest to perform the ceremonies. Otherwise, the text relating to the gratuity to be given to the priest by a Sudra who makes an adoption would be unmeaning. Now, let us apply the rule, which the judges themselves invoke—namely, that the obligation of performing the ceremonies is dispensed with so far as there is incapacity to perform. But surely the dispensation cannot go farther. Now, if we closely examine the words which stand as the authority for this exemption of the Sudras, we find that only prayers are dispensed with. This is one of the mischiefs of administering Hindu Law by persons who do not know the language in which that law is found. The word ‘prayer’ is a translation of the word ‘mantra.’ This word means ‘the verses’ of the Veda. Part of the ceremonies enjoined to be performed by a person making an adoption consists in reciting certain verses of the Veda. But a Sudra is prohibited from uttering the words of the sacred Veda. Therefore the author of the Dattaka M. starts the objection. How can a Súdra make an adoption, since he cannot recite the words directed to be recited, and since the efficacy of the ceremonies consists in their being completely performed? To this, the answer is, that as regards a Súdra, he need not himself; recite the prayers or the sacred words of the Veda but everything will be done for him by his priest. Such an explanation would add sense to the direction as regards the gratuity to the priest to be given by a Sudra. This view of the intention of the author of the D. M., is confirmed by what takes place in Srádha ceremonies performed by the Sudras, where the sacred verses are either omitted or mentally recited by the priest, as a Sudra is forbidden not only to utter, but even to hear, the sacred words. But as the Full-Bench was composed of English Judges, they were necessarily unacquainted with this practice; they had little sympathy for Hindu reli-

gious ceremonies. So they laid hold of the rule that dispenses with prayers as regards Sudra, to lay down that no ceremonies were necessary for a Sudra's adoption. By a similar process of reasoning, it might be maintained that no religious ceremonies were necessary even in the marriage of Sudras. If such a doctrine were adopted, the mischief would be immense. We may be free from the prejudices that accompany an orthodox belief in Hindu religion; but we should not forget that these religious ceremonies connected with some of the transactions of life which effect momentous changes in the status of persons are a guarantee of authenticity. By marriage or adoption, a complete stranger is introduced into the family. It is therefore necessary that there should be as little loophole as possible for palming off a spurious spouse or a spurious adopted son on the family. In a country, where there is no compulsory registration, the religious ceremonies are the only means by which publicity is given to the act. Even on the ground of expediency, therefore, the judges might have well hesitated to lay down a proposition which would take away a very important safeguard against fraud in the matter of adoption among Sudras.

The case of Behárilal Mullick thus discussed above, went up in appeal to England, and the decision of the Privy Council is reported in 6 C. L. R. 190. The judgment of their Lordships upon the question of law is as follows:—"The strongest argument against the proposition that no ceremonies are necessary among Sudras in addition to the giving and taking the child in adoption is founded on para. 56, Sec. V., D. M., which says:—'It is therefore established that the filiation of an adopted son is occasioned only by proper ceremonies; of gift, acceptance, burnt sacrifice, and so forth; should either be wanting, the filial relation even fails.'—It is admitted that whatever may be the force of the words 'so forth' in the case of

Brahmans, or members of the other superior classes, the only religious ceremony that is essential to an adoption by a Sudra is the *datta homam*, or burnt sacrifice, which, it is said, he, though as incompetent to perform that as he is to repeat the prescribed texts of Vedas, may perform by the intervention of a Brahman Priest. The authorities, however, which have been with great candour fully cited by Mr. Cowie show that it has long been questioned whether even the performance of the *datta-homam* was essential to a valid adoption, at all events in the case of Sudras. Jagannatha lays down (3 Dig 244) this broad proposition :—"The oblation to fire with holy words from the Veda is an unessential part of the ceremony ; even though it be defective, the adoption is nevertheless valid ;" and in arguing in support of this proposition, he seems to make no distinction between Sudras and the superior castes. In the case before the Privy Council, *Suttrughan Satupati, v., Sabitri Dye*,—2 Knapp, 287—(which, it appears, was a case between Brahmans), Lord Wynford says in his judgment :—"But although neither written acknowledgments nor the performance of any religious ceremonies are essential to the validity of adoptions, such acknowledgments are usually given, such ceremonies observed, and notice given of times when adoptions are to take place in all families of distinction, such as Zemindars and opulent Brahmans ; wherever these are omitted, it behoves the Court to regard, with extreme suspicion, the proof offered in support of the adoption." This statement of law is perhaps of more value than it would otherwise have been, when it is considered that the case on one side was argued by Mr. Serjeant Spankie, who had great experience in India, and probably was better acquainted, than English Counsel at that period generally were, with questions of Hindu usage and law. It cannot, however, be regarded as more than a dictum, since the decision was against the adoption as a fact. It was nevertheless, in accordance with the law as laid down by Sir Thomas Strange, at pp. 83 and 84 of the

first volume of his treatise, first edition, and the authorities cited by him. Then it has been more recently decided by the Madras High Court that even in the case of an adoption by a Brahmani woman the ceremony is not necessary. Their Lordships intend to follow the example of the High Court in this case in not considering to what extent the Madras decision is correct, and how far the ceremonies may be omitted in the case of an adoption by a Brahmani woman. They may, however, observe that the reasoning applied by the Madras High Court applies even *a fortiori* to Sudras. The other Indian decisions which have been cited, and particularly those of the Sudder Dewanny Adawlat, clearly show that the present question has long been treated as an open and vexed one by Pundits as well as judges. It was so treated in a case before their Lordships, in 1872—Sreenaran Mitter, 11 B. L. R. P. C. 171—but was not then decided, the suit being dismissed upon another ground. Lastly the Full-Bench in this case appears to have satisfied itself that the passage in the Dattaka-nirnaya, upon which Pundit Shamacharana Sircar in his Vyavastha Darpana relies as an answer to those who deny that the performance of the *Datta-homam* is essential to an adoption by a Sudra, is in fact an authority the other way. Upon the whole, their Lordships have come to the conclusion that the weight of authority is in favor of this finding of the Full-Bench of the High Court. They would have been sorry to come to a different conclusion; because, although it may be true that the use of the ceremony in question on the occasion of an adoption is so general amongst Sudras that the absence of it, may fairly, as Lord Wynford observed, cast suspicion upon a doubtful case of adoption, yet to hold that where the giving and taking of a child in adoption are established, the omission of the ceremony would invalidate that adoption would mischievously, as they conceive, strengthen the meshes of the purely ceremonial law, and tend to encourage suits against *bond fide* adoptions. Their

Lordships agreeing with and adopting the finding of the Full-Bench of the High Court, do not think it necessary to consider what would be the effect of the subsequent ceremony at Ashtominissa, as a remedy of any defect, which up to that time may have existed in the adoption. They only observe that they have not been referred to any distinct authority; that the defect may not be so supplied, particularly in cases where, as here, according to the evidence, it was first announced that the ceremonies incident to an adoption would take place at a subsequent time." This judgment refers to difference of opinion among Sanscrit authors themselves as to the necessity of ceremonies on the occasion of adoptions made by Sudras, Jagannatha and the author of the Dattaka-nirnaya expressly saying that ceremonies are not essential. Now, the European judges generally omit to consider that all treatises on law in Sanscrit are not equally authoritative; they forget that the text of a Rishi is superior in authority to the commentaries written by a later lawyer; and that there is a gradation as to authoritativeness even among these later commentators of Hindu Law. Thus; so far as the subject of adoption is concerned, the Dattak. ch., is universally regarded as the paramount authority in Bengal. This treatise quotes Saunaka's description of the formalities of adoption, wherein he mentions what a Sudra ought to give as gratuity to the priest [II., 14]. It is also said [II., 17] that in the absence of the observance of the formalities mentioned before, the son informally adopted does not become an heir, but simply gets wealth sufficient to defray the expenses of his marriage. As an authority for this proposition, the author of the Dattaka-chandrika quotes a text of Manu in VI., 3. Now, Saunaka is a Rishi, and he certainly is superior in authority to Jagannatha or the author of the Dattaka-nirnaya; and he says that it is competent to a Sudra to perform some ceremonies, as a part of which he mentions the payment of the gratuity to the priest. Manu cited in Dattaka-chandrika, VI., 3, says that

an informally adopted son does not become an heir ; and Manu is superior to Jagannatha and the author of the Dattaka-nir-naya. In spite of this clear expression of law by these high authorities, both the Full-Bench of the High Court and the Privy Council simply note the fact that the native authorities are not unanimous as to the indispensableness of the formalities ; and they therefore adopt that view of the matter which commended itself to them ; and it would have been easy to foresee which view would commend itself to them, unsympathetic as they must necessarily be to all religious notions cherished by the Hindus. On the other hand, an eminent Hindu Judge, Dwarkanath Mitter, expressed himself as follows with reference to the matter. In the case of *Rajah Opendralal, v., Ranee Bromomoyee*, 10 W. R. 347, he said :—“ The institution of adoption as it exists among Hindus, is essentially a religious institution. It originated chiefly, if not wholly, from motives of religion ; and an act of adoption is, for all intents and purposes, a religious act, but is one of such a nature, that its religious and temporal aspects are inseparable. The object of adoption is inseparable from Hindu religion, and all distinctions between religious and legal injunctions are inapplicable to it.” This sounds very different from what the Privy Council say as to the strengthening of the meshes of the ceremonial law. Both the Privy Council and the Full-Bench have overlooked the common sense view of things, viz., that adoption among Hindus is certainly as important a transaction as marriage is all over the world ; and that as in many civilized countries, marriage registration is insisted upon to be essential and indispensable as a guarantee of authenticity ; so, among Hindus, who are in many respects given to primeval observances, the celebration of religious ceremonies, either at marriage or at adoption, has been established by custom in order to prevent fraud and give publicity to the transaction, because performance of religious ceremonies is attended with more or less publicity : However, as

the Privy Council has now finally decided, the adoption among Sudras does not require anything more than giving and taking. But this giving and taking must be actual and complete, and it has been held that the mere execution of a deed of adoption unaccompanied by the actual delivery of the child to the adoptive family would not constitute a valid adoption among Sudras. *Sreenarayan Mitter v., Kishen Soondaree Dassee*, 11 W. R. 196. The Judgment in this case says:—"The giving and receiving of a child, in order to constitute a valid adoption, must be actual, and not simply a constructive giving and taking by execution of deeds. If after the execution of such deeds, the child is not delivered over by the natural father, the person who wanted to adopt is entitled to a decree declaring the deeds to be void." It should be mentioned here that when the adoption is made in the Kritrima form, no formalities are necessary even among the superior castes. The following is the history of the prevalence of that form of adoption in the Mithilá country, that is, the District of Tirhoot. The authority for it is Colebrooke as quoted by Sutherland in his synopsis, P. 191.—"The practice of adopting sons given by heir parents, was then abolished by Sridatta and Pratihasta, although the latter had been himself adopted in that manner. Their motive was, lest a child, already registered in one family, being again registered in another, a confusion of families and names should thence ensue. A son adopted in the form so briefly noticed in the present Section, does not lose his claim, nor assume the surname of his adoptive father. He merely performs obsequies and takes the inheritance." Sutherland adds:—"Sridatta and Pratihasta have not abolished the practice noticed, in their written works. A case of the nature alluded to, had occurred; in consequence, a general assembly of Bráhmans was held, at which the celebrated Pandits presided, and it was there agreed, that for the future, the practice of the Dattaka-adoption should be discontinued. But though this mode of adoption does not now prevail in the Mithilá country, unfor-

bidden as it is by Váchaspati Misra, and the best writers three current, it is not to be inferred, that if, in any case preferred, such mode of affiliation would be illegal." The formalities prescribed to be observed in making a Kritrima adoption have been thus described by Rudradhara, as cited in Sutherland's Synopsis, P. 192.—"At an auspicious time, the adopter of a son, having bathed, addressing the person to be adopted, who has also bathed, and to whom he has given some acceptable chattel, says. 'Be my son.' He replies, 'I am become thy son.' The giving of chattel to him rises merely from custom. It is not necessary to the adoption. The assent of both parties is requisite, and a set form of speech is not essential." The validity of the Kritrima adoption does not seem to require that any of the sacraments should be performed by the adoptive parent over the adopted son. These sacraments are such, as the Annaprásana, or the feeding with the rice, the chúra, or the tonsure, the Upanayana, or the investiture with the sacred thread, the marriage, and many others which formerly prevailed, but which have now nearly gone out of use. There is a passage in the Kálikápurána, of doubtful authenticity, cited both in the Dattaka-mimánsá. (IV. 22), and in the Dattaka-chandriká, (II. 25), which says that the affiliation of the adopted sons, the Dattaka, the Kritrima, and the others, depends upon the sacraments being performed by the adoptive parent. The idea seems to be that the frequent assertion on the occasion of the performance of each of those sacraments to the effect, that the adopted son belongs to the adoptive family, rivets as it were the bond between the son and the parent; and the greater the number of sacraments performed by the adoptive parent, the closer and more confirmed will the relationship be. Now as regards the Kritrima adoption, it does not seem that the adoptive father is under a necessity of performing any of the sacraments over the adopted son. For the kritrima son does not become a member of the adoptive family for all intents and purposes. The relationship is be-

between the parties ; the Kritrima son does not continue the line of the adoptive father, nor is he considered as the grandson of the father of his adoptive father. His connection in fact with the natural family remains intact. This adoption is so far a mere limited relationship between the adopted and the adopter, that even a woman may make this form of adoption independently of her husband. Thus in *Collector of Tirhoot v., Harraprasád Mohunt*, 7 W. R. 500, it is said that under the Hindu Law current in Mithilá, a Hindu widow has power to adopt a son in the Kritrima form with or without her husband's consent ; but such son would not, by virtue of such adoption, lose his position in his own family, nor would he succeed to the property left by the husband of her adoptive mother, but would be considered her son, and entitled to succeed to her property only. According to Macnaghten, a person adopted in the Kritrima form by the widow, even though the adoption should have been permitted by the husband, would not thereby become the adopted son of the husband. Again a Kritrima son adopted by a widow will perform her obsequies, and succeed to her peculiar property." Again in *Muss. Shiboo Koomáree v., Joogun Sing*, 8 W. R. 155, it is said.—"A widow in the Mithila province is capable of adopting in the Kritrima form without her husband's consent. A son adopted in the Kritrima form in the Mithilá Province does not become a member of the adoptive family, as far as collateral heirship is concerned, nor is he a grandson of his adoptive father's father, nor does he inherit from him, the relation of the Kritrima son, for the purposes of inheritance extending to the contracting parties only. A Kritrima adopted son, when adopted by the widow, with or without the authority of her husband, cannot in any case succeed to more than her adoptive mother's property, and has no claim to that of collaterals. No particular ceremonies would appear to be necessary to such adoption, nor would any particular age be fixed." Again in *Baboo Juswant Sing v.*,

Dooleechánd, 25 W. R. 255, it has been ruled that "natural begotten sons of a person who was adopted in the Kritrima form cannot question alienations made by the adoptive grandfather, the relations established by the kritrima form of adoption being confined to the contracting parties, and not extending beyond them on either side."

The next question is, what are the effects of an adoption, that is to say, how are the rights and privileges of an adopted son affected by the fact of his being validly adopted? The 1st effect is that a Dattaka son becomes a member of the family of his adoptive father. He ceases to have any claim to the family or estate of his natural father; but his relation by consanguinity to the natural family so far subsists, that he cannot marry a woman within the prohibited degrees of relationship by reference to that family. The Dattaka son cannot perform obsequial ceremonies of his natural father. He is to perform those ceremonies of his adoptive father and adoptive mother, and is to regard the father of his adoptive mother as his maternal grandfather. With regard to his rights of inheritance, he does not of course inherit from his natural father or mother; but he does from his adoptive father and adoptive mother, and also from any person belonging to either of those two families, in the same way as if he had been a natural born son of his adoptive father and mother. The following are some of the cases with regard to that point. In the Privy Council case of *Shambhoochunder Chowdhuri v., Narayani Dabi*, 5 W. R. P. R., it was held that an adopted son succeeds lineally and collaterally, the reason being that he becomes for all purposes the son of his adoptive father. In *Makundalál v., Baikuntha*, I. L. R. 6 Cal. 289, the proposition established was that an adopted son, distant by more than three degrees from the common ancestor of himself and a deceased relative of his adoptive father, is an heir equally with a natural born son.

The judgment in this case is as follows:—"The Plaintiff being the adopted son of one Brajanáth Roy, sues as heir of Gourkishore Roy for possession of the estate left by the latter. Ther relationship, though lineal, is somewhat distant, Brajanáth's father being Gourkishor's third cousin. The only point raised is that by reason of being an adopted and not a natural begotten son of Brajanáth Roy, Plaintiff is no heir to Gourkishore, —under the Hindu Law, an adopted son not being recognized as a Sakulya or a Samanodaka, or as entitled to inherit if he be not a sapinda, that is, related within 3 degrees from the common ancestor. The general principle is very clearly laid down in S. 6, para. 53:—'Without difference, the relation to the father or other sires of the adopter obtains in the same manner as relation to the general family, the family deity, and family rules of that person: the term son is used without restriction in these and other passages.' Unless therefore we found some authorities, clearly restricting the rights of inheritance on the part of an adopted son, and declaring that they are something less than those of a naturally begotten son, we should make no distinction between them. There is a distinction declared by Hindu Law where a naturally begotten son inherits jointly with a son previously adopted, but we can find no express authority for limiting the rights of an adopted son to inherit, the estate of one related lineally by more than three generations from the common ancestor. The point seems never to have been raised before in our Courts, but we observe the judgment of this Court in the case of *Táramohan Bhattácháryya v., Kristamoyee Dabya*, 9 W. R. 423, admits the rights of an adopted son to one more distantly related to him. The following is the important portion of the judgment in this case of *Táramohan*. 'The question is whether an adopted son, though entitled to succeed to the property of his adoptive father, can succeed to the property of the relations of his adoptive father. It is urged in support of the negative of this proposition, that the

text of Devala, cited in S. 7, Ch. 10, *Dáyabhága*, and the author's comment thereon in S. 8, are to this effect. The true legitimate son and the rest, to the number six, are not only heirs of their father, but are also heirs of their kinsmen, that is, of *sapindas* and other relations. The others are successors of their adoptive father, but not heirs of collateral relations, that is, *sapindas*. Then, with reference to the share to be received by the adopted son, Sec., 9 is cited, which is to this effect:—‘The adopted son takes the whole estate of the father, who has no legitimately begotten son; but if there be such a son, then the adopted son, provided he is not of a different caste, takes one-third of the estate.’ With regard to the question of the right of the adopted son to succeed collaterally as well as lineally, it is sufficient to quote the Privy Council decision of *Sambhuchandra Chaudhuri*, dated 6th February, 1835, and reported in *Sutherland's Privy Council Judgments*, 25, which ruled, that according to the authorities on Hindu Law, and the weight due to them, an adopted son succeeds not only lineally, but collaterally to the inheritance of his relations. The next question is whether an adopted son takes only a third, or is entitled to share equally with a collateral relative who is a legitimately begotten son of his father. There is no contention, that if after a son be adopted, a son of the body be born, the latter is entitled to the larger portion of the inheritance, whether two-thirds or three-fourths, and the former only to the remainder. There can also be no doubt that an adopted son is also entitled to all the rights and privileges of a son of the body legitimately begotten, whether there is no such son subsequently born. The decisions of the late *Sudder Court*, and the following passages from the *Vyavasthádarpana*, verse 584, supported by authorities prove, that such is the case:—‘An absolute *Dattaka* properly adopted ceasing to belong to the *gotra* of his natural father, becomes a member of the family of the adopter, and represents a legitimately begotten

son, and the duties and the rights of the legitimately begotten son devolve upon him.' A case is quoted from 2 Macnaghten, P. 69. Looking at the answer given, we have some doubt whether there was not some confusion in the mind of the Pandit as to the position of the adopted son in that case, but whether this be so or not, that case is not applicable to the present. It appears that the position of an adopted son is affected only by the birth of a subsequent legitimately begotten son of the adopter, that when an adopted son comes to share with heirs other than the legitimately begotten sons of his adoptive father in the property of his kinsmen, he takes the same share that they would have. He represents his adoptive father, and is entitled to the share, which his father would have obtained. In the present case, Plaintiff and Defendant are in equal relationship to Ramánáth Chackrabarty: their respective grandfathers were his first cousins once removed, so that if his property had been inherited either by their grandfathers or by their fathers, the shares of each would have been equal; and such being the case, there is no reason why the Plaintiff and Defendant should not each take the share to which their respective fathers were entitled. A passage from the Dattaka-chandriká, Sec. V, para. 25, has been quoted to us to prove that the adopted son of a brother does not receive the same share as his uncle; but all that the passage appears to rule is, that the adopted son of one adopted succeeds only to his adoptive father's estate. In the present case, the adoptive father would have been entitled to the moiety of the property left by Ramánáth Chakravarti, and his son is, we believe, entitled to that share. The rule requiring an adopted son to take a smaller share than a son of the body does not, in our opinion, hold good in this case, for the claimants do not derive their title from the same father.' In the case of Padmakumári Devi v., Jagatkishor, reported in P. 222, 2 Shome's Report, the person whose property the subject of dispute was Bhawanikishor. The two competitors

for succession were Gagan and Joykishor. Gagan was the adopted son of the maternal grandfather of Bhawanikishor. Joykishor was the greatgrandson of the maternal greatgrandfather of Bhawanikishor. Gagan was nearer, but only an adopted son. The question raised before the High Court was, whether Gagan, being only an adopted son, could be an heir to his adoptive father's daughter's son, the contention being that an adopted son does not succeed to the estate of a bhinnagotra sapinda. Mr. Justice Rameshchandra Mitra delivered the following judgment upon this question. "The question of Hindu Law has been decided by the Lower Courts in favor of Joykishor solely on the authority of a sloka on a text of Manu, cited by Kullúka Bhatta, the well-known commentator of the Institutes of Manu. The text of Manu and the sloka in question are to be found Pp. 145, 146 of Colebrooke's Digest, vol 3, B. V., Ch. 4, Sec., I. Whether this sloka supports the conclusion of the Lower Court is a question to which I shall hereafter refer. But it is beyond all doubt that it would not be a correct basis of decision, if the position laid down in it be found opposed to authorities that are generally appealed to and govern the decision of questions of adoption arising in the Bengal School. These are the two well-known works on adoption, *viz.*, the Dattaka-chandriká by Devanda Bhatta and the Dattaka-mimánsá by Nanda Pandita. Then, how does the question raised before us stand upon the authority of these two works on adoption? It appears abundantly clear from both those treatises, that the position and status of an adopted son are precisely the same as those of a natural born son, except in a few instances which are expressly enumerated. In Sec. 3, para. 1, Dattaka-chandriká, the author after laying down the special rule, *viz.*, that an adopted son cannot officiate in the six funeral repasts, if the legitimate son exists, says:—'And a text of Yájñavalkya recites:—Amongst them the next in order is heir, and presents funeral oblations on failure of the preceding.

Otherwise the adopted son in every respect resembles the real legitimate son. The same author in discussing the question, whether an adopted son succeeds to empire, or not, says in Sec. V., para. 28. 'Thus, the son of the wife, the son given, and the rest, receive the share prescribed for them by the general law. For, grounds for contracting the operation of the same are wanting.' Again, in Sec., V., para. 53, Dattaka-mimánsá, it is laid down. 'The adopted son, as substitute for the real legitimate son, being the agent of rites performed by the legitimate son, it follows that he is the performer of the funeral repasts, the objects of which are, the *manes*, in honor of whom the legitimate son performs such repasts. For without difference, relation to the father and other sires of the adopter obtains in the same manner as relation to the general family, the *sákha*, the family deity, and family rules of that person.'—From these passages it is evident, that the rights of an adopted son, unless curtailed by express texts, are in every respect similar to those of a natural born son. Have any texts been produced to show that an adopted son cannot succeed to the estate of such relatives of his father as are sprung from a different family? The learned advocates who argued this question before us in support of the Plaintiff's contention have not been able to refer to any authority to establish this proposition. On the other hand, both in the Dattaka-mimánsá and the Dattaka-chandriká there are passages which lead to the opposite conclusion. The author of the Dattaka-chandriká after referring to the contradictory texts of ancient Rishis upon the subject of the adopted son being heir of his father's kinsmen, in Section 5, para. 22 says—'By reason of succeeding to the estate of *sapinda* kinsmen, as well as to that of father, he is argued by the one to be heir to kinsmen.' Then after reconciling in the same paragraph these contradictory passages in a way which it is not necessary here to notice, in para. 24, he lays down the law thus:—'Therefore, by the same relationship of brother and

so forth in virtue of which the real legitimate son would succeed to the estate of a brother or *other kinsmen* when such son may not exist, the adopted son takes the whole estate even.'—Now reading the two passages together, it is clear that the phrase '*other kinsmen*,' italicised above, at least includes the sapinda kinsmen, if not others. Therefore, we have next to consider the question whether Gagan is a sapinda kinsman of Bhabánikishor or not. The following passages from the Dattaka-chandriká and the Dattaka-mimánsá will show, that as regards sapinda relationship in the family of the adoptive father, there is no difference between a Dattaka and a natural born son. Para. 32, Sec., 6, D. M.—'Therefore, not being otherwise inferrible, the relation of sapinda in the peculiar family (kula) of the adopter as founded only on express texts of law, must be admitted. This is declared. Relation of sapinda is of two descriptions,—through consanguinity, and connection by funeral oblation. Of these, the relation of sapinda by consanguinity being obviously barred, in the case of the adopted son ;—Hemádri, after having declared the relation, as arising alone from connection by funeral oblation and consanguinity, has determined the relation of sapinda of sons given and the rest, in the family of the adoptive father, as extending only to the 3rd degree.'—Para. 38. 'But in the instance of the real legitimate son, is not thus the performance of sapindakarana for his father, with three forefathers only, established by holy writ? Being established then by this alone, for what purpose is the inconvenience of introducing another express text to declare it?' Anticipating this objection, the author subjoins. 'Therefore, this of adopted sons is a relation of sapinda extending only to the third degree, being productive of uncleanness and disability of marriage, and consisting in connection by funeral oblations, &c., &c.' Para. 39. 'Intending merely this, it is said by the author of the Sangraha—The relation as sapinda, of adopted sons, extends to three degrees in the family of the natural

father, and like that, in the adopter. This is a rule of law.—The mention here of relation as *sapinda* in both families, is with reference to the son of two fathers; for, it has been shown, that the ceremony of *sapindakarana* for such son is performed with two sets of forefathers. Of the absolutely apoted son, the relation as *sapinda* in the family of the adopter, consisting in connection by funeral oblations, extends to three degrees; in the family of the maternal father arising only from consanguinity, it extends to seven degrees. To enlarge would be useless." Dattaka Ch., S. 3, para. 16. "In the same manner, by parity of reason, where there may be a diversity of mothers, the sires of the natural mother are first designated by a son, who is son to two fathers, at the funeral repast, in honor of the maternal grandsires sires of her, who is the adoptive mother. 'Where the paternal sires are honored, there certainly are the maternal.'—Para. 17.—'But the absolutely adopted son presents oblations to the father and the other ancestors of his adoptive mother only; for, he is capable of performing the funeral rites of that mother only, and this in conformity with the text, 'He is destined to continue the line of his ancestor's—which is added as a reason, in the text of Vasishttha, for the prohibition contained therein,—viz., this—'Let not a woman give an only son.'—This prohibition refers to an adopted son, other than the *Dyámushyáyana*; for, where the adopted son is such, no extinction of lineage ensues, as has already been declared.' It is thus established that the adopted son succeeds to the *sapinda* kinsmen of his father; and that as regards *sapinda* relationship, there is no difference between the adopted son and the natural born son. The question therefore is, whether Gagan, the adopted son of the maternal grandfather of Bhabánikishore, can be said to be a *sapinda* of Bhabáni. It is clear that the three paternal ancestors of Gagan in the adoptive line are the three immediate maternal male ancestors of Bhabáni. While living,

Bhabánikishore was bound to offer funeral cakes to those three maternal ancestors, when he performed the párvana rite. He now being dead, participates in the funeral offerings made by Gagan on similar occasions to the same three ancestors, who are his adoptive father, grandfather and greatgrandfather ; consequently Gagan and Bhabánikishore are related to one another as sapinda in accordance with the definition of a sapinda laid down in the Full-Bench decision, reported in 5 B. L. R. 15. This definition is entirely in accordance with para. 38, Sec., 1, Ch., 11, Dáyabhága ; and para. 7, Ch., 11, Dayátatva. It has been contended that verse 8, Ch. 10, Dayábhágá, supports the conclusion that an adopted son is not a sapinda to the relations of his adoptive father who are not of the same gotra with him. It is said that the son given is not included among the first six kinds of sons, who are declared to be heirs of kinsmen in general. This conclusion is clearly opposed to the decision of the Judicial Committee in the case of Sambhuchandra Chaudhuri v., Náráyani Dabee reported at P. 55, 3 Knapp's Reports. If we are to adopt this conclusion, we must hold that an adopted son cannot succeed collaterally at all—a position opposed to the uniform current of decided cases upon the subject. It is true that in some of these cases it has been taken for granted that the text in question of the Dáyabhága bears the construction that an adopted son does not succeed from the kinsmen of his adoptive family. But a careful examination of the immediately preceding verse, viz., verse, 7, will show that is not the correct construction of verse 8. The author of the Dáyabhága derives his conclusion in verse 8 from Devala's text referred to in verse 7. But it is not correct to say that Devala's text places the 'son given' within the class of sons who are not heirs of kinsmen. Devala's text is not before us, and it may be that he in reciting the twelve descriptions of sons, followed the order given in verse 7, because we find the same text which is referred to in the Dattaka-chandriká and the Dattaka-mimánsá and

Colebrooke's. Digest recite of in the same order." ***
 As this judgment is exceedingly long, instead of quoting it entire, I here give the purport of it—which is, that the two treatises, viz., the Dattaka-chandriká and the Dattaka-mimáṃsá being accepted as the highest authorities in this part of the country, and they having declared that the adopted son is an heir to his sapinda kinsmen, and it also appearing from particular passages in these works that the term 'sapinda' as understood by them included persons of both the same and a different gotra, there cannot be a question that according to these two works, an adopted son has a right to inherit from the relatives of his adoptive mother. The F. B. case of *Umásankar Maitra v. Kálikamal Mazumdár* was one in which the adopted son claimed to be the heir of the brother of his adoptive mother. In the case of *Gangáprasád Roy v. Brajesvari Chaudhurani*, which was reported in P. 1091, S. D. A., 1859, the brother's son of the adoptive mother claimed to be the heir of his father's sister's adopted son. And that case was decided in favor of the claimant, and it was established there, virtually at least, that the relationship of the adopted son to the family of his adoptive mother was equally extensive with that of the natural-born or aurasa son. There is also a F. B. case of the Allahabad High Court, *Shám Kuer v. Gayádin*, I. L. R., 1 All 255, in which that Court also held that the adopted son could succeed to the estate of his maternal grandfather in the adoptive line. So that, both as regards the Bengal Law and the Benares Law, it is now settled, that the adopted son's rights of inheritance extend to the line of the adoptive mother's family.*

There is another question in connection with the subject of the succession of an adopted son, viz., what will he get, if after his adoption, the adoptive father subsequently begets a natural-born son? The primary authority upon the point is the text of *Vasistha*, cited, Sec. 10, para. 1, *Dattaka-mimán-*

६३; this text is as follows :—" When he, that is, the son given, has been adopted, if a natural-born son is subsequently born, the son given takes one-fourth share." This text is ambiguous; for it may mean either that the adopted son takes one-fourth of what the natural-born son takes, or it may mean that he takes one-fourth of what the adoptive father left. But in the *Dáyabhága*, Ch., 10. para. 7, it is said that a 'given son' takes one-third when he divides the property with the natural-born son. From this it would appear that the text of *Vasistha* is to be interpreted in a way that may put it in harmony with the text of *Devala*, the *Rishi*, upon whose authority the author of the *Dáyabhága* has declared the above proposition of law; that is to say, the adopted son, when he takes in conjunction with the natural-born son, takes one-fourth share of the *whole* property, and one-third share of what the natural-born son takes. In the case of *Raghavananda Das v., Sádhucharan Das*, I. L. R. 4 Cal. 429, Mr. Justice Markby lays down the following proposition of law :—" Upon partition, an adopted son, and the adopted son of a natural-born son stand exactly in the same position, and each takes only the share proper for an adopted son, namely the half of the share which he would have taken, had he been a natural-born son. This proposition is said to be deducible from the following two paras of D. Ch., namely, paras 24 and 25, Sec. V. Para 24 runs thus :—" Therefore, by the same relation of brother and so forth, in virtue of which the real legitimate son would succeed to the estate of a brother or other kinsman, the adopted son of the same description obtains his due share. And in the event of the ancestor having other sons, a grandson by adoption whose father is dead, obtains the share of an adopted son. Where such may not exist, the adopted son takes the whole estate even." Para 25 :—" Since it is a restrictive rule that a grandson succeeds to the appropriate share of his own father, the son given, where the adopter is a real legitimate son of the paternal grandfather, is entitled to an

equal share with the paternal uncle, who is also such description of son; therefore a grandson, who is an adopted son, may inherit an equal share even with an uncle. This must not be alleged. For there would be this discrepancy: where the father of the grandson is an adopted son, he would receive a fourth share; but the grandson, if he were such son of his, would receive an equal share with an uncle in the heritage of the grandfather. Accordingly whatever share may be established by law for a father of the same description as himself, to such appropriate share of his father, does the individual in question succeed. Thus what had been advanced only is correct. The same rule is to be applied by inference to the great-grandson also." In this case, the family consisted of natural-born sons of two brothers, and an adopted son of a third brother and these members of the family wanted to divide the property of the grandfather. The High Court ruled that the adopted son should get one-sixth, instead of one-third of the property. (I. L. R. 4 Cal. 429—Rághavananda Das). In the case of Dinanath Mukerji v. Gopal Charan Mukerji, 8 C. L. R. 59, the property to be divided belonged to the great-grandfather's grandson of the parties who claimed it; one of these parties was the adopted son of his father, and it was contended against him that he was entitled to one-half of what he would have had if he had been a natural-born son, on the authority of the case of Rághavananda Das, I. L. R. 4 Cal. 229, cited above. But the High Court held that the case of Rághavananda did not apply to the circumstances of the case before them, as it was not a case where an adopted son of a natural son claimed to be an heir along with another son or sons born to the adoptive father or grandfather. The Judges also quote the case of Tárámohan Bhattacharyya v. Kripámayi Debya, 9 W. R. 424, where the observations of the Court were as follows:—"It is not disputed that if after a son has been adopted, a son of the body be born to the adoptive father, the greater part of the property, either three-fourths or two-thirds, goes to the natural-

born son. But it is also undisputed, that where there is no subsequently born legitimate son, the adopted son is entitled to all the rights and privileges belonging to a natural-born son. The position of a adopted son is only affected by the birth of a subsequently begotten legitimate son of the adoptive father; when an adopted son comes to share with heirs other than the legitimately begotten sons of his father in the property of kinsmen, he takes the same share that they would have. He represents his adoptive father, and is entitled to the share that his father would have obtained." In this case, 9 W. R. 424, the property claimed belonged to Ramánáth Chakravarti, whose heirs plaintiff and defendant claimed to be. The relationship of both plaintiff and defendant to Ramanath Chakravarti was equal; their respective grandfathers were his first cousins; and their respective fathers were his first cousins once removed; if the property had been inherited either by the grandfathers, or the fathers, of the plaintiff and the defendant, the shares received by them would have been the same; therefore the High Court held that the plaintiff and the defendant should get an equal share, although one of them was an adopted son; with regard to para. 25, Sec. V, D. Ch. The Judges observe.— "All that this passage rules is, that the adopted son of one adopted succeeds only to his adoptive father's share. In the present case, we find that the adoptive father would have been entitled to the moiety of the property left by Ramánáth Chakravarti. His son is entitled to that share. The rule requiring an adopted son to take a smaller share than a son of the body does not hold good, where the claimants do not derive their title from the same father."

We have thus seen that the position of the adopted son has gradually become more and more assimilated to that of a natural-born son. At first it was supposed that he did not inherit from the collateral relations. But this point was settled in his favor by the case of Sambhu Ch. 5 W. R. P. R.

100. Then it was supposed that he was not an heir to such relations of his adoptive father as did not bear the same gotra with the adoptive father. But this point also was settled in his favor in the case of *Jaykishore Chaudhury v. Panchu Babu*, 4 C., L. R. 538; there it was supposed, and that supposition had been confirmed by the Full-Bench case of *Mrinmayi Debya*, Sp. W. R. 127, in which the late Hon'ble Mr. Justice Sambhunnath Pandit had by an elaborate and studiedly erudite judgment come to the conclusion, that an adopted son did not succeed to the estate of the relatives of his adoptive mother. But it remained for Mr. Justice Rameschandra Mitter, to establish by another Full-Bench Decision, namely in the case of *Umásankar Maitra v., Kali Kámal Mazumdar*, that an adopted son succeeded to the estate of all the sapinda kinsmen in the adoptive family, whether these sapinda kinsmen belonged to the family of his adoptive father, or of his adoptive mother, and whether they were of the same gotra with his adoptive father, or of a different gotra from him.

ON STRIDHANA OR THE PECULIAR PROPERTY OF A WOMAN,

UNDER THE BENGAL LAW.

We have seen that the widow succeeds to the property of her husband, in default of son, grandson, or great grandson. We have also seen that in this property the widow has a limited interest, an interest which the Privy Council have called a restricted estate of inheritance, by which it is understood that the widow cannot sell or otherwise alienate it unless for specified purposes. Now, under the Hindu Law, there is another class of property belonging to a woman, over which she has an absolute power of disposal, which is technically called stridhana or the peculiar property of a woman. The word means, regard being had to its derivation, 'wealth of a woman'; and in the *Mitákshará*, we find that the author is not disposed to give a technical meaning to it; but under the Bengal school, a techni-

cal meaning has been attached to it; the result whereof is, that any property belonging to a woman is not stridhana, but such property only as she can absolutely dispose of. Under the Benares Law also, the word is now understood in this technical sense owing to the circumstance that the British administrators of Hindu Law, had not their attention drawn to the particular passage of the Mitákshará wherein it^o is said that all wealth belonging to a woman is her stridhana. According to the Daya-bhágá, stridhana or the peculiar property of a woman is any property which has been given to her by her father, mother, husband, brother or son; that which she has received near the nuptial fire; that which she has received on account of being superseded by another wife of her husband; that which has been given by the relatives; the sulka or the fees; the anvádheya or gift subsequent. A text of Kátyáyana is quoted in the Daya-bhága to explain the nature of this anvádheya, or gift subsequent. The substance of this text is, that anvádheya or gift subsequent is that wealth which a married woman receives after her marriage, from persons related to her either through her father, or through her mother, or through her husband. To this list Manu and Nárada add another kind of property, which they call Adhyávaharika. This is explained as that property which is received by a married woman from her father's family, when she for the first time goes to her husband's house with a view to take her permanent residence there. This second visit to her husband's house called the ceremony of Dvirágamana, or the second visit to the house of her husband, the first visit taking place immediately after the marriage ceremony. It is well-known that on the occasion of this second visit, the custom of this country requires that a large assortment of house-hold articles, including vessels, utensils, clothing, and all the varied paraphernatia of a respectable house keeping have to be supplied to the married daughter by her father, or other guardian that there may be. Every body knows that like the celebration of the marriage itself, the Dvirágamana

ceremony is a pretty oppressive occasion for expenditure to be incurred by the paternal family of the married young woman. It seems that this property, so accompanying her on her second visit to her husband's house, has received in the phraseology of Hindu Law, the name of *Adhyāvaharika*. We have seen in the above list of *stridhana*, there is one class called the gift from the husband. We must not confound this with the property of the deceased husband to which a woman succeeds as heir; for that is not her *stridhana*, or peculiar property, she not having an absolute power of disposal over it. There is a text of Devala, quoted in the *Dāyabhāga*, (Ch. 4, §. 1, para 15), which says: 'subsistence ornaments, the *sūlka*, the profit,—all this becomes the peculiar property of a woman. She herself enjoys all this: the husband cannot take it, unless in distress.' This text of Devala is important, as it is an authority for holding, that any property assigned to a woman for her maintenance is to be considered her *stridhana*. *Manu* and *Kātyāyana* say: 'what is received near the fire, the *Adhyāvaharika*, what has been given to a woman from affection, and what has been given by brother, mother, or father: these are the six kinds of *stridhana* property.' So that these two *Rishis* seem to limit *stridhana* to six kinds only. Upon this point, however, the author of the *Dāyabhāga* says, that this hard and fast limitation of the *stridhana* property to six kinds is to be disregarded, since other *Rishis* enumerate other kinds of *stridhana* property: thus Devala mentions, subsistence and *sūlka*; *Yajñavalkya* mentions that which is received by a superseded wife, therefore the author of the *Dayabhāga* concludes that the six kinds enumerated by *Manu* and *Kātyāyana* are not exhaustive. According to him, any property which a woman can dispose of at her pleasure without being subject to the control of her husband is her *stridhana* or peculiar property. 'Whether any particular description of property owned by a woman is exempt from the control of her husband or not, there is no general rule to determine by. *Kātyāyana*

says, (D. Ch. 4, S. 1, para 19). Property or wealth, earned by a woman, by exercising some art, such as painting, music, &c., and any wealth which she has received from a person no way related to her, is not exempt from the control of her husband, in fact, it is to be considered as subject to the ownership of her husband. Any other property owned by a woman is her stridhana. The author of the 'D. says, that property received from a person who does not belong to the family of the father, or mother, or husband of the woman, or what she has earned by plying an art, is liable to be appropriated by her husband even when he is not in distress. This alludes to the rule of law relating to all kinds of stridhana whatsoever, that the husband can appropriate the peculiar property of his wife, at the time of a general famine or scarcity, or in performing some religious ceremony, or when he is ill, or for the sake of a ransom when he has fallen into an enemy's hand. On all such occasions, if the husband has appropriated the peculiar property of a woman, in order to relieve himself from his difficulties, he need not restore it, when his difficulties are over. But the earnings of a woman with the exercise of some art, or gifts obtained from a person not related, the husband may appropriate at any time he chooses; where no spare as the real peculiar property of a woman, he cannot appropriate unless at the aforesaid times of distress. The law even goes so far as to say, that the husband will be punished, if he does so appropriate the real peculiar property of a woman, except by reason of the aforesaid difficulties. Therefore, any wealth owned by a woman is not her stridhana, but only such wealth owned by her, as she can dispose of at her pleasure, or as is exempt from her husband's control. We have seen that the wealth succeeded to by a widow as heir of her deceased husband is no doubt wealth owned by a woman; her proprietary right to it is undoubted; yet it is not her stridhana, because she cannot dispose of it at her pleasure; her power of alienation is restricted; it is only

legal necessities that can justify her alienation. Again, Kátyáyana adds that gifts from strangers and earnings made by arts, are no doubt owned by a woman; she can dispose of them, if the husband does not interfere, or does not appropriate them; but in as much as they are not exempt from her husband's control, they are not stridhana. In contradistinction to this kind of property, the same Rishi Kátyáyana says:—Whether married, or unmarried, whether in the house of her husband, or in the house of her father, whatever is received by a woman from her husband, or from either of her parents, is declared to be an affectionate gift. (Saudáyika.) An affectionate gift obtained by women, is at their independent, absolute and uncontrolled disposal; the reason being, that it has been bestowed upon them by way of subsistence by these relatives from feelings of sympathy and affection. Law declares that as regards an affectionate gift, the women are always independent, in the matter of selling it, or giving it away, just as they please, even though it be immoveable property.' This is the law as declared by Kátyáyana. But we must supplement it by what Nárada has said. 'What has been affectionately given by her husband to a woman, she is entitled to enjoy at her pleasure, or to give away; excepting only immoveable property.' This seems to clash with Kátyáyana's dictum. But there is a method of bringing about a harmony between two apparently conflicting authorities, the method is called বিষয় বিভাগ, or 'defining the application.' In the present instance of an apparent conflict between Nárada and Kátyáyana, both equally authoritative, that method is applied. And the result is—that a woman can absolutely dispose of immoveable property given to her by any other relative than her husband; but her power over immoveable property given to her by her husband is restricted. It is not, however, clear from the authorities, what these restrictions are. Possibly, the reasonable inference is, that so long as her husband is alive, a woman cannot alienate or give away immove-

able property given by her husband, without consulting him, but when he dies, her power over it becomes absolute as in other kinds of stridhana. Because it has been given by her husband, it comes under the definition of a *saudáyika* or affectionate gift, as defined by Kátyayana (D. Bh. 4, S. 4 para 21). It is only a kind of stridhana, subject to a particular restriction. The power of restricting her in the disposal of her peculiar property is vested in the husband. Therefore, when he dies, there is no one else who can claim to restrict her power; after the death of the husband, therefore, the immoveable property given by the husband comes under the general category of a woman's peculiar property. But this argument is open to the objection, that the words of Nárada are: 'what has been given to a woman by her husband from affection, can be enjoyed by her at her pleasure, or given away, even after he is dead; excepting the immoveable property given by her husband.' The plain meaning of these words would be, that after the death of the husband, a woman can enjoy all peculiar property at her pleasure, excepting land given by her husband: *i. e.*, land given by her husband she cannot enjoy at pleasure or give away, even after his death. But as there is no indication as to who is to restrict her, the point has still remained doubtful, and will remain so, so long as there is no authoritative ruling by the High Court. In the case of *Tinkari Chatterji v., Dinanath Banerji*, 3 W. R. 49, the judges observe:— "A woman can not execute a will regarding any property she inherits in the usual course from her husband or her father; for in this, she has but a life-interest; but it is otherwise with stridhana, which she has liberty to dispose of at her pleasure, either by gift or will or sale, except in the case of immoveable property, given to her by her husband.' With regard to the rule of law which gives some control and power over the peculiar property of a woman to her husband, it is limited by the condition that the husband must be otherwise unable to maintain himself, in which case the texts of Rishis give him autho-

rity to appropriate the peculiar property of his wife. The two Rishis, Yājñavalkya and Kātyāyana, lay down the law upon the subject in the following way. When a general scarcity prevails in the country, or when money is wanted for the performance of a religious ceremony, or when the husband is ill, or when he has been arrested for debt by some creditor, he may appropriate the peculiar property of his wife, without being liable to pay it back. In every other case, neither the husband, nor the son, neither her father, nor her brothers, are authorized to take or spend the peculiar property of a woman. If any one of these relatives, does appropriate her peculiar property in a high-handed manner, he is liable to pay it back together with interest, and is also liable to a penalty to be inflicted by the king. If any one of these relatives appropriates her peculiar property, by her permission, affectionately given, then he is liable to pay the principal alone, when he is in a condition to pay and is in solvent circumstances. If her husband has got two wives, and if he is at the same time not cordial or affectionate towards that wife whose peculiar property he has appropriated with her voluntary permission, in that case the repayment should be enforced from him. If the woman herself is in distress on account of subsistence, raiment or dwelling-place, which distress may have arisen by the negligence of her husband, then she has a right to take back her own property, and also the share of those who have taken the wealth. These declarations of law by such authoritative Rishis as Yājñavalkya and Kātyāyana seem to be a sufficient protection for the peculiar property of woman, against any illegal interference on the part of her near relations.

With regard to the rules of succession relating to the peculiar property of woman, the most general provision is that sons and unmarried daughters succeed together to the peculiar property of a woman. But if the peculiar property be of that special kind, which is called yautaka, then the unmarried

case succeeds to it. The reason assigned for their succeeding to the mother's peculiar property is that they also are issue, and that it is only in default of issue that persons, other than one's descendants can claim to be heirs. We must remember that this rule of children or their descendants being preferred to others is limited to the peculiar property of women. The provisions of law detailed above relate to such peculiar property of women as does not fall under the jautaka class. The reason for making a distinction between the two classes of property, namely what is jautaka, and what is not jautaka, is a certain apparent conflict between the texts of the following Rishis viz., Gautama, Nárada, Kátyáyana, Yajnavalkya, Manu and Devala. Gautama says.—“The peculiar property of women devolves upon unmarried daughters, and upon daughters not well-placed in life.” Here there is no mention of the son's co-ordinate right. Nárada says :—“The mother's property the daughters get; in their default, the race thereof.” Kátyáyana says. “That wealth, that is, the mother's wealth will go to the sons in default of daughters.” Yajnavalkya says.—“The daughters will get mother's property after paying the debts; in default of daughters, the race thereof gets.” These four Rishis, therefore, Gautama, Nárada, Kátyáyana and Yajnavalkya unmistakably give a preferential right to the daughter over the son, as regards the peculiar property of a woman. But Devala says :—“(D. Bh., Ch. 4, S. 1, para 6) when a woman dies, her peculiar property is common between the sons and the daughters. When she dies without leaving issue, the husband should take, the brother, the mother, or the father.” Here Devala contradicts the above named four Rishis. This contradiction must be some how removed. Now the indication for the removal of the conflict is supplied by Manu, who says.—“What jautaka property there may be belonging to the mother, that should fall to the share of the unmarried daughter.” From this we may easily deduce what the intentions of Gautama, Nárada, Kátyáyana and Yajnavalkya are, and what the inten-

tion of Devala is. The first four are speaking of the jautakā property, although they do not expressly name it; Devala is speaking of property which is not jautaka, although he neglects expressly to say so. But Manu has thrown a light upon the subject, and expressly says that the jautaka property devolves upon unmarried or virgin daughters. Therefore, according to the principle of explaining the vague statement of one Rishi by a more definite statement of another Rishi, we remove the conflict between Gautama, Nārada, Kātyāyana and Yajñavalka on the one hand, and Devala on the other hand, by supposing that the provisions of law laid down by the first four apply to the jautaka property, and that Devala's text applies to what is not jautaka property. Besides the classification of peculiar property under the two heads of jautaka and non-jautaka, there is another classification, under the two heads of what has been given by a woman's father, and what has not been so given. The source of this second classification is the following text of Manu :—' Whatever wealth there may be, belonging to a woman, given by her father at any time,—that a Brahman's unmarried daughter should take ;—or it should belong to the issue thereof.' The meaning of this text, according to the author of the Dāyabhāga, is, that if property has been given by a woman's father even at a time other than the time of marriage, that also will devolve exclusively upon unmarried daughters, and the sons will have no share. All jautaka, or nuptial gifts in general, devolve upon an unmarried daughter alone, and all gifts from the father, whether nuptial or not, devolve upon an unmarried daughter alone ; and all other peculiar property of a woman devolves upon sons and unmarried daughters together. These are three provisions of law deducible from a conjoint interpretation of all the above cited Rishi texts. The expression 'Brahmani daughter' is, according to the author of the Dāyabhāga, surplusage. It does not imply that a Kshatriya woman's peculiar property will not be inherited by her kshatriya daughter. The real meaning according to the Dā-

yabhága is, that to whatever caste the woman may belong, when peculiar property is to be inherited, her own unmarried daughter will succeed to such of her peculiar property as may have been given to her by her father at any time. The mention of 'Brahman' is illustrative; and includes all castes. Then the author of the Dáyabhága proposes an alternative interpretation of the text, and says: that when there are wives of different castes, it is a daughter of the Brahman caste who will inherit in exclusion of daughters of other castes. This latter interpretation is of no moment now, since inter-marriages have been long abolished among Hindus in this part of the country; and though there are some forms of inter-marriage in some of the Eastern Districts of Bengal, for instance, in Sylhet and Chittágong, I am not aware that the Brahman caste in those Districts, ever contracts any form of intermarriage, either with a male or a female of an inferior caste. So that the alternative interpretation of Manu's text will not have any application whatsoever in these days. With regard to the text of Gautama, which says that the peculiar property first devolves upon those daughters who have not been given away, and those who have not been well-placed in life, the author of the Dáyabhága construes this as implying that the daughters are to be classified under three heads, namely (1) unbetrothed, (2) betrothed, (3) married. The jautaka or nuptial property first devolves upon the unbetrothed daughters; in default of the unbetrothed daughters, it devolves upon the betrothed daughters. In default of the latter, it devolves upon the married daughters; in default thereof, upon the sons. The expression 'well-placed in life,' or *pratishthitá*, according to the author of the Dáyabhága, includes both the betrothed and the married. It appears from this division of the daughters into three classes, that in the days of the author of the Dáyabhága, ceremony of betrothal constituted an important transaction in the marriage of a girl. At present, the only ceremony which bears any resemblance to the ceremony of

betrothal is the lagnapatra, or the instrument in writing which fixes the marriage day, which is executed with some solemnity among certain of the respectable castes; but the interval between that ceremony and the actual celebration of marriage is purposely made short; as it is considered to be a disgrace if after this betrothal, the daughter by some mischance, comes not to be married to the intended bridegroom. But, however short this interval may be, during that period, the daughter is to be considered as betrothed, in the sense of the *Dáyabhága*; and such a betrothed daughter will be postponed to the absolutely unbetrothed daughter, in the matter of inheriting the nuptial or jautaka property of her mother.

So far as regards the rights of inheritance of the peculiar property of a woman who has left any issue. We must contemplate the peculiar property as classified first under the two heads of nuptial or jautaka, and non-nuptial or ajautaka. We must again classify it under two other heads of what has been given by the father, and what has not been given by him. This second classification has no connection with the first. For the gifts made by the father at any time, whether before or during, or after the marriage of the daughter, come under one comprehensive class of 'gifts from father.' All such gifts from father are first of all inherited by the unmarried daughter. In this matter, the author of the *Dáyabhága* does not say, that there is any distinction between the unbetrothed and the betrothed. Therefore we must suppose that so far as this kind of property, namely gifts from father, is concerned, there is no distinction between the unbetrothed, and the betrothed.

Then comes the question of succession to the peculiar property of a woman, who has left no issue. In order to understand this part of the law of succession to the peculiar property of a woman, we must know something of the Hindu Law of mar-

riage. That law is to be found in Manu, Ch. 3, verse 20 et. seq. The substance of the law is as follows. There are eight forms of marriage declared to be prevalent among societies who observe the rule of four castes. The first and the most approved form of marriage is called the Bráhma. This form consists in the father of the bride inviting a bridegroom possessed of learning and good character, giving him and the bride clothes and ornaments, and making over the daughter to him. The second form is called the Daiva. In it the father of the bride begins to perform a sacrificial ceremony, and accepts the priestly ministrations of some learned Brahman towards the completion of that ceremony, and instead of paying any dakshina or priestly fees for such ministration, he decorates his daughter with ornaments and gives her in marriage to the officiating priest in lieu of his fees. The 3rd. form is called the Arsha or one prevailing among persons of the Rishi class. In it the father of the bride takes a single pair of cattle, consisting of a bull and a cow, or two such pairs, in consideration for the marriage, and gives his daughter in marriage to the bridegroom. Here there is something like an exchange or barter; and the girl is in a manner sold for cattle. This form therefore is inferior to the first two, viz., the Brahma, and the Daiva. The word 'Bráhma' would seem derivatively to signify 'holy' 'sanctified' 'religious.' The word Daiva means 'divine.' The very names of the first two forms, namely the 'religious marriage' or the 'holy wedlock' and the 'divine marriage', seem to imply the superiority of these two forms to that where cattle are offered to the guardian of the bride in exchange for the girl. The fourth form is called the 'prajāpatya,' wherein the girl is given away with these words, 'let these two persons be united and lead together a virtuous and religious life.' The distinction between this and the Bráhma form seems to be, that there is less formality in it, and a smaller number of religious solemnities observed in it, at the time of celebrating the marriage, than in the Bráhma form; and the bridegroom seems to receive

no presents in it from the guardian of the bride, unlike the Bráhma form. The fifth form is called the Asura, or the form prevailing among demons, or irreligious persons. In it, the bride-groom gives money to the relatives of the bride, and also to the bride herself, and thus marries the girl. The distinction between the principles of this form and the prajāpatya form is, that in the prajāpatya form the amount of consideration payable by the bride-groom is fixed, viz., one pair of cattle, or two such pairs. But in the Asura form, there is no limit to the amount of the consideration payable by the bride-groom; being left to the discretion of the contracting parties, which in other words means, that the bride-groom will have to pay as much as satisfies the relatives of the girl, and the girl herself. The sixth form is called the Gándharva. In it, the girl and the bride-groom feel a liking for one another, and enter into a contract of life-long union, without any reference to their respective guardians. The nature of it may be well understood by calling to mind the story of Dushyanta and Sukuntalá, whose marriage was an instance of the pure Gándharva form. This also seems to be the form which has superseded all others among the Europeans, although when they celebrate marriages in a Church under the priestly ministrations of a minister of religion, a ceremony, consisting in giving away the bride, is seldom omitted. The observance of this ceremony may indicate that in former times, this branch of the Aryan stock also used to observe some form of marriage akin to our Bráhma form. But the civil marriage of the Europeans, or their marriage before a Registrar, is an unalloyed example of our Gándharva form. The seventh form is called the Rákshasa. It is described in Manu as follows.—The relatives of the bride are killed or stabbed; their house is demolished; the bride is crying and screaming; the bride-groom or his party forcibly abducts the girl: this is the Rakshaka form. To declare such a union between a male and a female as valid, was, it seems,

necessitated by the conditions of a warlike state of society, at a time when the arts of peace had developed but little, and a general spirit of pacific and law-abiding habits had yet to grow. Under such conditions, the wise Bráhmaṇik lawgivers thought it better to declare it as a valid marriage, rather than leave the girl without any status at all. Such abductions must have been then not unfrequent. When the girl was once abducted and brought under the control of a ferocious barbarian, her virginity was seldom respected; she in fact was violated. The best course under these circumstances was to declare her as the lawful wife of the abductor, and to give her such rights and privileges as go along with the status of a lawful wife. This, it seems to me, is the solution of the mystery, how Manu, one of the wisest of lawgivers that appeared among men, gave the sanction of legality to such a form of marriage as the Rákshasa was. Similar observations will apply to the 8th form, which involved conduct of a still more opprobrious character. Manu describes it thus:—"If the bride groom does the act of cohabitation, while the girl is asleep, or intoxicated, or heedless in protecting her person,—that is the most sinful and the lowest of all the forms of marriage; it is called paisácha, that is, a form of marriage obtaining among pisáchas, or imps and goblins." It is needless to add, that in the days of the Indian Penal Code, both the Rákshasa and the paisácha forms, would, if followed in practice, be severely punished. We may therefore consider these two forms, as entirely obsolete in modern times. It ought to be mentioned here that there has been a ruling by the High Court of Calcutta which lays down that the Bráhma is the only form of marriage having prevalence among Hindus in the Kali age. Sec. 16 W. R. 105, Jadunath Sarkar. The majority of marriages celebrated now among respectable Hindus are no doubt of the bráhma form. For, no respectable Hindu father of a girl ever thinks of accepting money from the bride-groom in consideration

of giving his daughter in marriage; while even the poorest man spends something when he marries his daughter. The 2nd and 3rd forms, the Daiva and the Prajāpatya, are necessarily obsolete now, for there is no performance of such sacrificial ceremonies now, as used to take place in former times; nor are there any Rishis now strictly so called. Nor is the Gandharva form possible among orthodox Hindus, for girls are generally married before they arrive at the age of puberty, and their marriages are arranged by their guardians without any reference to the girls themselves. The Rākshasa and the Paisācha involve acts which are illegal and punishable by Courts. So that the only two possible forms are the Brāhma and the Asura; the distinction between the two being, that in the Brāhma, it is the bride's party that takes upon itself most part of the expenditure; while in the Asura, the case is reversed, and the bride-groom's party has to spend money. Among the Bansaja Brahmans of Bengal, this is invariably so, the bride-groom often sells his all in order to secure a wife, by paying the dowry to the bride's father. Among them it is proverbial that the price of a girl increases with her age; and the father generally contrives to elude the rigorous rule of Hindu law which enforces the marriage of a girl, before she arrives at the age of puberty. I do not therefore see, why such marriages as take place among the Bansaja Brahmans should not be classed with the Asura form; and why all the legal incidents of that form should not be attached to them. These legal incidents of the different forms of marriage principally concern the law of succession to the peculiar property of women.

Having given some idea of the nature of these forms, I shall now deal with that law of succession, so far as it is affected by the form of marriage under which the woman was married. That law is so affected, only in case of a woman who has died without any issue. And as an unmarried girl is in

most cases necessarily childless, the Hindu lawyers deal with questions of succession to the peculiar property of an unmarried girl, in this part of the subject. With regard to the succession to the peculiar property of a childless married woman, the forms of marriage are divided into two classes: the 1st class consists of the five marriages, viz. (1) Bráhma (2) Daiva, (3) Arsha, (4) Prajápátya, (5) Gandharva, the second class consists, (1) Asura (2) Rakshasa (3) Paisácha. The law is that the jautaka property of a childless married woman who was married under any of the first five forms goes to her husband; while in case the marriage was celebrated under any of the last three forms, the jautaka property goes to the mother; in default of the mother, it goes to the father. Remembering that only two out of these eight forms of marriage are prevalent, viz., the Bráhma and Asura, and remembering also that the Gandharva form may be said to be possible among the Bráhma section of the Hindu community, we may state the above proposition of law to be as follows: in the Bráhma and the Gandharava forms of marriage, the jautaka property goes to the husband; in the Asura form, it goes to the mother; then to the father. But the peculiar property of a childless woman, which she had obtained or received as gifts from any member of the families of her father, or mother or husband, will go to her brothers in all forms of marriage. The brothers are also heirs to two other kinds of peculiar property, respectively called sulka and anvadheya. Sulka is thus described by the author of the Dáyabhága. Sulka is either a bribe offered by builders and other artisans to the wife in order that she may encourage her husband to commence particular building operations and so forth, so that the builder and other workmen may have an opportunity of making profits. Or sulka is any money or property which the husband pays to his wife in order to induce her to go to her husband's house. This discloses a curious state of manners. If we confine our attention to the definition of a sulka

as given in the Rishi text, we find that it is described in the following manner. "Whatever price may be received on account of the household furniture and paraphernalia, or of animals which are used for carrying purposes, or milking purposes, or from the the making of ornaments, is declared to be sulka." Animals for carrying purposes are bulls and horses and the like. Animals for milking purposes are cows and she-goats and the like. Now, it would not be wide of the mark if we suppose that sulka consisted of perquisites received by the wife whenever any purchases were made for the household, or whenever any workmen or artisans were employed, some percentage of the price being given by the sellers or the workmen or the artisans. They in fact would now be called the 'dustoori.' The author of the Dáyabhaga says that such earnings of a childless married woman devolve on her death on her brothers, in exclusion of her husband, mother and father. We must therefore carefully class together these kinds of peculiar property, namely, received from parents' family, from husbands' family, and sulka. The first two kinds, that received from parents' family and husbands' family being known by the common name of anvádheya, or gift subsequent. Calling Súlka as perquisites, we may state the proposition of law to be, perquisites and gift subsequent of a childless married woman devolve on her brothers. This sulka must not be confounded with the sulka which the father receives in the Asura form from the bride-groom in consideration for giving his daughter in marriage. That also is called sulka, and may be called the bride-money. The bride-money from the very beginning belongs to the father and it is no part of the girl's peculiar property. The other form of sulka which is a peculiar property is the money given by the husband to the child-wife to induce her to come to his house. The sulka first goes to the brother, in his default to the mother; in her default to the father; in father's default, to the husband. The word 'brother' here must be confined

only to the whole brothers, as the author of the *Dáyabhaga* says (4, 3, 29). In default of the husband, the following scheme of succession has been prepared by the author of the *Dáyabhaga*, whose principle of selection is the well-known one of spiritual benefits. Therefore, if there be no husband, then the peculiar property is to be taken (1) by husband's younger brother, because he gives a cake to herself, to her husband, and to three ancestors to whom her husband was bound to offer cakes. In default of the husband's younger brother, the next persons in succession are the sons of the younger and the elder brothers of the husband together; for they offer a cake to herself, to her husband, and to two ancestors to whom her husband was bound to offer cakes, and because they are her sapinda; In their default, the next in succession is the son of her sister, because he gives a cake to herself, and to three maternal ancestors to whom her own son would have been bound to offer cakes. In his default, the next in succession is her husband's sister's son. The reason why her own sister's son excludes her husband's sister's son is this. Own sister's son and husband's sister's son are to be regarded very much like her sons; and as her own son would have excluded her husband; so, her own sister's son ought, by analogy, to exclude her husband's sister's son. The reason why the husband's sister's son is at all an heir is, that he gives her a cake, and also to her husband, and offers cakes to three ancestors of her husband, who are three maternal male ancestors of her husband's sister's son. Next after husband's sister's son is her own brother's son, because he gives a cake to herself and also to her father and grand-father. Next after him is her daughter's husband, because he gives a cake to herself and also to her husband.

This complicated law of succession, as it obtains in Bengal, with regard to the peculiar property of a woman, has been thus summarised in Srikrishna's commentary. If the

deceased was an unmarried girl, then the successive heirs to her peculiar property are (1) whole brother (2) mother (3) father. If she was a betrothed girl, then any property which may have been given her by her betrothed husband is inherited by him. The rules of inheritance with regard to all other property of a betrothed girl is the same with the unmarried girl. With regard to a married woman, the successive heirs to her *jautaka* or nuptial property are (1) unmarried unbetrothed daughter; (2) unmarried betrothed daughter; (3) married qualified daughters, namely, a daughter having a son and a daughter having the likelihood of getting a son. In absence of either, the other will take the whole; (4) barren and widowed daughters; in absence of either, the other will get the whole. (5) Son; (6) daughter's son; (7) son's son; (8) son's son's son; (9) co-wife's son; (10) co-wife's son's son; (11) co-wife's son's son's son. According to *Dáyabhāga*, daughter's son comes after co-wife's son's son's son. Then if the property be nuptial, and the woman was married either in the *Bráhma*, or the *Daiva* or the *Arsha*, or the *Prajápatya* or the *Gándharva* form, the successive heirs are (12) husband (13) brother (14) mother (15) father. If the woman was married in one of the other three forms, viz., *Asura*, *Rákshasa* or *Paisácha*, then the order of succession is (12) mother; (13) father; (14) brother; (15) husband; (16) husband's younger brother; (17) the sons of all brothers of husband together; (18) sister's son; (19) husband's sister's son; (20) brother's son; (21) son-in-law; (22) father-in-law; (23) husband's elder brother; (24) all the *sapindas* in due order, that is, according to proximity; (25) the *sakulyas* in due order; (26) the *samanodakas* in due order. If the property be other than nuptial, and if it be her father's gifts, the (1) in succession is unmarried daughter; (2) son; (3) qualified daughters; (4) son's son; (5) daughter's son; (6) son's son's son; (7) co-wife's son; (8) co-wife's son's son; (9) co-wife's son's son's son; (10) barren and childless widowed daughter together; (11) then as in the case of nuptial property according

to the form of marriage. If the property be other than father's gifts, and not nuptial, then the son and the unmarried daughter inherit together, then the qualified daughters, then son's son; then daughter's son; then son's son's son; then the co-wife's son; then the son of the last; then the son of the last; then the barren and the childless widowed daughter together; then as in the case of the nuptial property, regard being had to the form of marriage, and so on.

I now come upon the subject of stridhana according to the Mitákshará. According to Yájñavalkya, the stridhana is that property of a woman which has been given to her either by her mother or father, husband, or her brother; or which has been received by her near the nuptial fire; or which has been received by her from her husband, on account of being superseded by the marriage of another wife; and so forth. Upon this text, the author of the Mitákshará remarks that here the expression 'so forth' indicates that there are other kinds of stridhana property, besides those mentioned above; these other kinds are what a woman obtains by partition, inheritance, finding of a hidden treasure, or seizure of some unowned property. According to the Mitákshará, the word 'stridhana' has no technical meaning attached to it; but it signifies any property which is owned by a woman. But it has been decided that what a widow receives as the heir of her husband is not her stridhana. This decision is entirely at variance with the text of the Mitákshará; but it is not likely that the error will ever be rectified so long as Hindu Law is administered by British Judges. Then the Mitákshará illustrates the different kinds of stridhana. The nuptial property is the property which is given to a woman at the time of the marriage, when burnt offerings are made upon the nuptial fire. Another kind of stridhana is received by her when she goes to her husband's

house from the house of her father. Then there are the gifts from her father-in-law, and from her mother-in-law, and gifts which she receives from persons who offer her money at the same time that they salute her feet, as a son-in-law does. Then there are gifts from affectionate kindred ; then the gifts from other relatives ; and the *súlka* and the gift subsequent received by her after her marriage, from any one belonging to the family of her father, mother or husband. These are simply illustrations to show how a woman may come to own peculiar property. *Súlka*, according to the *Mitákshará*, is explained to be the money which is the consideration for which a girl is given in marriage to the bridegroom. We have seen how the author of the *Dáyabhága* explains this word '*sulka*'. The same author also takes exception to the *Mitákshará* explanation of the word *sulka* and says, that as the consideration for the marriage is paid to the guardian of the bride, and not to the bride herself, it cannot therefore be her peculiar property. To this, the answer of the followers of the *Mitákshará* School is, that this bride-money is generally intended by the guardian of the girl, to be made over to her ; it therefore becomes her property. As the *Mitákshará* school attached no technical sense to the word '*stridhana*,' it simply divides '*stridhana*' into two classes. The 1st division, being composed of such peculiar property of a woman as is absolutely at her disposal, without any control from any body else. The 2nd division is such property as is subject to the control of her husband.

The 1st rule regarding succession to the peculiar property of a woman according to the *Mitakshara* is that in all the forms of marriage, her property first goes to her daughters. If there be daughters who are married and those who are not married, then the unmarried exclude the married ; in their default, the married daughters take ; among them also, the indigent daughter excludes the rich ; the childless excludes one

who has children. But this rule does not apply to what has been called and defined above as 'sulka.' This 'sulka' goes to the whole brothers of the woman; in default of whole brothers, it goes to her mother. If there be no daughter of any kind, married or unmarried, the property devolves upon daughter's daughters; when daughter's daughters are born of different mothers, and are unequal in number, their shares are made up by reference to their mothers. Thus A and B being two daughters, A left 3 daughters, and B left 4; then the grand-mother's peculiar property is divided into two shares first; one share goes to the three daughters of A; the another goes to the 4 daughters of B. Therefore each daughter of A takes $\frac{1}{3}$; and each daughter of B takes $\frac{1}{4}$ of the whole peculiar property. This in fact is nothing but the application of the principle of representation in case of succession to the woman's peculiar property; a principle which is applied to grandsons by different fathers when they inherit from their grandfather. If there be both daughters, and daughter's daughters, existing at the same time, the author of the Mitákshará says that a small part of the property should be given to the daughter's daughter. This declaration of law is based upon the following text of Manu. "If there be any daughters of these daughters, to them also, something should be given, out of the wealth of their maternal grandmother, from motives of affection, in accordance with their merits." But the text not saying how much, whether $\frac{1}{3}$, $\frac{1}{4}$ or $\frac{1}{8}$, the provision is uncertain, and therefore inapplicable and nugatory. I therefore apprehend that the daughter's daughters will receive nothing, when there are any daughters alive. The next in succession after daughter's daughters are daughter's sons. In default of daughter's sons, the woman's own sons take her peculiar property. After the sons come the son's sons. In their default, the husband and the rest take the woman's property. These other heirs are mother, father, whole brother, sister's

son, husband's sister's son, husband's brother's son, own brother's son, son-in-law and husband's younger brother. These take in accordance with nearness of relationship. So far the Viramitrodaya says. But wherein that nearness of relationship consists, it is difficult to say. Nor is the law yet quite settled upon this part of the succession to woman's peculiar property. We can simply note the fact that the above named heirs are recognized as heirs; and that when any of them exists, the property cannot escheat to Government.

In the case of *Muss. Durgá Kumari v., Muss. Teju Kuer*, 5 W. R. M. 53, the Judges held that if property be given by a son to his mother for the purposes of the mother's maintenance, the property will constitute the stridhana of the mother. We have seen that according to the *Dáyabhága*, maintenance property given to a woman is a form of stridhana. Although the above case was governed by the Benares Law, still the principle applies for the Benares Law is, if anything, more liberal than the *Dáyabhága* on the subject of stridhana; since it holds that any property to which a woman's ownership attaches will constitute her stridhana. In the case of *Srinath Ganguli*, 10 W. R. 488, the Judges say:—If a woman leaves at the time of her death, both a betrothed and an unbetrothed daughter, it is the latter who succeeds to the peculiar property of her mother, in exclusion of the former. Nor can the former succeed to it, after the death of the latter, that is, of the unbetrothed daughter. The reason for this is, that when stridhana has once devolved as stridhana upon an heir, it does not, after the death of that heir, again devolve according to the rules applicable to the succession of the stridhana property; but it goes according to the ordinary rules of succession.

Lectures on Hindu Law

ALIENATION.

The subject of alienation may be considered under the following heads:—

(1.) Alienation by the father of a Mitákshará family; (2.) By the manager of a joint family, whether governed by the Mitákshará or the Dáyabhága Law; (3.) By the manager or guardian for an infant; (4.) By a female enjoying the Hindu widow's estate.

IN BENGAL, it has now been established that the father has absolute right over the ancestral property; he can sell, give, or pledge immovable or moveable ancestral property, without the consent of his sons; he can also, without such consent, by will, prevent, alter, or affect the succession to such property. (3 W. R. 226, Haralal Chaudhuri.)

But under the Mitákshará, the father is the co-owner of his sons, as regards ancestral property; for the sons' right accrues by birth. This means, that as soon as a son is born, he obtains a vested right in the ancestral property. The son can demand from his father a partition of it; and if it be one son, ancestral property will be shared equally by father and son, half going to each. Therefore, after the birth of a son, the father cannot alienate the ancestral property, because it does not wholly belong to him, but his son or sons are interested; and they or somebody on their behalf, if they are infants, can interdict the father from making the alienation. He or any other member of the joint family cannot alienate, that is, mortgage or sell, even his own individual or fractional share of the joint

was legal necessity, and if there were good, reasonable and sufficient grounds for the purchaser's so supposing, the sale or mortgage will still be valid, even though the guardian may have acted fraudulently towards the infant.

This principle is considered as applicable to purchases from the father of a joint family governed by the Mitákshará Law. The purchaser from such a father does not take upon himself the entire risk of the existence of a case of necessity for the alienation. He is bound to enquire, if a mortgage of joint ancestral property be made by the father, into the necessities for the loan, and to satisfy himself, as well as he can, that the manager is acting in the particular instance, for the benefit of the estate. A *bonâ fide* creditor should not suffer, when he has acted honestly and with due caution, but is himself deceived. (6 W.R. 149, Muss. Bhooran Kooer.)

This case also shows that no general rule can be laid down as to the question, upon whom does the onus lie? The presumptions proper to be made will vary with the circumstances of each case.

As instances of legal necessity in case of an infant, may be mentioned, the subsistence of the infant, his education, his medical treatment when he is ill, expenses of his family deity if there is any, maintenance of his mother, grand-mother, and unmarried sisters, and also the expenses for the marriage of the latter.

It may be safely said with reference to all classes of managers, whether it be a manager for a Mitákshará family, or for a Dáyabhága family, or for an infant, that a manager is liable to give an account of his management, to the other members interested in the property. In case of an infant, the manager will have to give an account of his management when the infant comes of age. (13 W.R. F. B. 79, Abhaychunder Roy Chowdhury.) The ruling in this case is that as the members of a joint Hindu family have a right to a share of the property, and that as wherever there is a joint right in

the property, and one party receives all the profits, that party, namely the manager, is bound to account to the other parties who have an interest in it for the profits of their respective shares, after making such deductions as he may have a right to make. This was a case under the *Dáyabhága* law; but the rule has been admitted to be applicable to the case of a *Mitákshará* family also. (22 W.R. 202, *Muss. Nowlaso.*) With regard to the widow's power of alienating property inherited by her from her husband, the law is to be found in the following passage of the *Dáyabhága*. (Ch. 11, S. 1 para 56.) "But the wife must only enjoy her husband's estate after his demise. She is not entitled to make a gift, mortgage, or sale of it. Thus *Kátyáyana* says, 'let the childless widow, preserving unsullied the bed of her lord, and abiding with her venerable protector, enjoy with moderation the property until her death. After her let the heirs take it.'

57. "Abiding with her venerable protector," that is, with her father-in-law or others of her husband's family, let her enjoy her husband's estate during her life; and not, as with her separate property, make a gift, mortgage, or sale of it, at her pleasure.

60. "Thus, in the *Mahábhárata*, in the chapter entitled *Dánadharma*, it is said, 'for women, heritage of their husbands is pronounced applicable to use. Let not women on any account make waste of their husband's wealth.'

61. "Even use should not be by wearing delicate apparel and similar luxuries; but, since a widow benefits her husband by the preservation of her person, the use of property, sufficient for that purpose is authorized. In like manner, even a gift or other alienation is permitted for the completion of her husband's funeral rites. Accordingly the author says, 'let not women make waste,' Here 'waste' intends expenditure not useful to the owner of the property.

62. "Hence, if she be unable to subsist otherwise, she is authorized to mortgage the property; or, if still unable, she

consent of the reversioners is a strong proof of the existence of such necessity. (Kaleemohun Deb, 6 W.R. 51). It may be also maintained on another ground, namely, that the reversioners being the only parties competent to contest the alienation, their consent removes all objections to its validity. This consent on the part of the reversioners may be proved by showing that they have attested the deed of sale executed by the widow, though the attestation would not be a conclusive proof of their consent. (Gopalchunder Manna, 6 W.R. 52.) It is also competent to the widow to alienate the property to the reversioner himself, in which case the act will be valid; the reason being that according to the general principles of Hindu Law, every person in possession of property can relinquish the world; the relinquishment of the world has the same effect which the natural death of that person would have. Thus the next heir will thereupon take possession of the property. The widow's relinquishment of the property in favor of the then reversioners would have a similar legal operation by analogy; and her relinquishment in favor of the second reversioners is also valid if made with the consent of the first reversioners. (Protap Chunder Roy, 1 W. R. 98).

The following are some of the cases relating to the widow's power of alienation in general.

* Attestation or assent by the then next heir is not conclusive, although it is a very strong evidence of the legal necessity for an alienation made by the widow. The purchaser from the widow need only prove, that he did enquire as to the existence of the necessity, but he is not responsible for the actual existence of it, (Madhab Chunder Hazra, 9 W. R. 350). A daughter succeeding after the termination of a Hindu widow's life estate, has full right to alienate any portion of the estate in her possession if the benefit of her husband's soul required such a sacrifice, even though the act by which that benefit was to be secured was to be actually

performed by a male member of the family. It is a mistake to suppose that she holds the estate in trust for the benefit of the next heir of her husband. Such an heir cannot contest an alienation made for the spiritual benefit of the last full owner. (Chowdry Junmenjoy. 10 W. R. 309).

The validity of a deed of alienation made by a Hindu widow is not established simply by the fact that it contains the attestation of a distant relative. The husband's kindred whose consent would render the deed valid are all those likely to be interested in disputing the transaction. The concurrence of the members of the family must be such as suffices to raise a presumption that the transaction was a fair one, and one justified by Hindu Law. The mere attestation of the instrument by a relative does not necessarily import concurrence. (Rajlukkhi Debyah, 12 W. R. P. R. 50). An alienation by a widow is valid if the conveyance is jointly by her and the reversionary heir, in which case the title of the alienee will be complete, without the widow first surrendering her estate to the reversioner, and then the reversioner making the conveyance. The general principle of law which is at the root of the validity of such a conveyance is, that when several parties join in a conveyance and convey the whole and entire property absolutely, they must be taken to have exercised every power which they possess, and to have parted with their whole interest, whether in possession or in expectation. (14 W. R. 379, Mohunt Kishen Geer.) As regards alienation of property inherited from her father, a daughter is actually in the same position with a widow, as regards property inherited from her husband. (20 W. R. 102, Deo Pershad.) The widow's power of alienation for spiritual purposes is larger than the power of alienation to which necessity gives rise. A power of alienation can only be exercised by her under two classes of contingencies, one class comprising cases of necessity, and the other class cases of raising funds for spiritual purposes. (20 W. R. 187, Moteeram Kower.) It is an act of waste on the part of the widow to

make collusive transfers of portions of her husband's inheritance; such acts of waste justify the court to take the management of the estate from her hand. (5 W. R. 141, Doorga Dayee.) A Hindu widow is competent to alienate, with the consent of the next heirs, her husband's inheritance; and can also convey the estate to the next heir himself. This follows from her power to retire from and relinquish the world by becoming a Byragee, which conduct on her part will cause the succession to devolve on the reversioner. (23 W.R. 219, Amritolal Bose.) A conveyance by a widow for other than allowable causes, of property inherited from her husband, is not an act of waste destroying her estate and vesting the property in the next heir. The conveyance is binding during the widow's life, but not binding upon the next heir after her death. During her lifetime the next heir cannot recover the property, either for his own use, or for the use of the widow, or compel the restoration of it to her. If the widow in any case be imposed upon and induced by fraud to execute a conveyance, it will be void, as in other cases of fraud. (Sp. No. W.R. 195, Gobindomoney Dássee.) Although a widow cannot permanently alienate any part of her husband's real estate except on proved necessity, she can still dispose of her life-interest in it. (1 W.R. 214, Taraknath.) The consent of the then reversionary heir to a conveyance by a widow confers an absolute estate on the vendee, as against the lawful heir, the consenting reversioner having predeceased the widow. (7 C. L. R. 575, Trilochan.)

ON JOINT FAMILY.

A joint family is a number of persons descended from the same ancestor, living together and possessing property in common. The property possessed in common is called joint property. In the majority of cases this property is the same as

the ancestral property. The above definition must be supplemented by saying that the wives of the male members are also considered as members of the joint family, so much so that any property held in the name of any of these female members will be presumed to be property belonging to the whole family, until the contrary is shown. (15 W.R. 357, Chnndernáth.) A joint family is commonly described as joint in food, worship and estate. The normal state of every Hindu family is joint. The presumption of law is that every such family is joint in food, worship and estate. Division must be proved by the party relying upon it. But it is not necessary that the members should be joint in all the above three things in order to constitute a joint family. They may sever as regards food and worship, and remain joint as regards estate; even then they will be called a joint family (12 W. R. P. R. 21, Neelkisto Deb). It is also possible for the member of a joint family to be the owner of separate property, that is, property belonging solely and exclusively to himself. In such a case, as under the Mitakshara, the joint property of a childless male member is not inherited by his widow, but after his death survives or lapses to the other male members with whom he was joint, it has been held that the separate and exclusive property of a childless member is inherited by his widow, the right of survivorship not attaching to such separate property, (2 W.R. P. R. 31, Kattama Natchiar *vs.* Raja of Sivagunga, otherwise styled "The Sivagunga case.")

The rights of the members of a joint Mitákshará family have been described as follows. No individual member, while the family remains undivided, can predicate of the joint and undivided property, that he, that particular member, has a certain definite share. He cannot go to the place where the rent of the joint property is collected, to claim from the gomashtha or tehsildar a certain definite share. The proceeds of the joint property are to be brought to the common chest and then disposed of in the way in which undivided property ought to be enjoyed, (8

W. R. P. R. 1, Appoovier *vs.* Ramsubha Aiyar). Their rights have been further explained in the following words of a judgment of Sir Barnes Peacock. (Sadabrat Pershad Sahu, 12 W.R. F.B. 7). "According to the law of England, if there be two joint tenants, a severance is effected by one of them, conveying his share to a stranger, as well as by partition; but joint tenants under the English law are in a very different position from the members of a joint Hindu family under the Mitákshara law. For instance, if a Hindu family consists of a father and three sons, any one of the sons has a right to compel a partition of the joint ancestral property, but when partition is made during the life of the father, his wives are entitled to shares; and if partition is made after the death of the father, his widows are entitled to shares, and daughters are entitled to participate. If partition be made during the life of the father, and a brother is afterwards born, that brother alone will be entitled to succeed to the share allotted to the father upon partition. But so long as the family remains joint and separation has not been effected, either by partition or by agreement, every son who is born becomes upon his birth entitled to an interest in the undivided ancestral property. In such a case, neither the father nor any one of the sons can at a particular moment say what share he will be entitled to when partition takes place. The shares to which the members would be entitled on partition are constantly varying by births, deaths, marriages, &c. No sharer before partition can without the assent of his co-sharers can determine the joint character of the property by conveying away his share. If he could do so, he would have the power by his own will, without resorting to partition, the only means known to the law for that purpose, to exclude from participation in the portion conveyed away, those who by subsequent birth would become members of the joint family, and entitled to shares upon partition."

The above is a description of a joint family governed by the Mitákshara law. There may be joint families under the Dáyā-

bhāga law. But the two classes of joint families differ materially. Under the *Dāyabhāga*, there is no right of survivorship. If a member dies childless, whether he was joint or separate, his widow succeeds to his share. Again, in Bengal, the sons are not co-owners with their father in the ancestral property; they therefore cannot demand a partition of it from him; nor can they prevent the father's alienating the whole ancestral property, or wasting it even, if the father is so disposed. The Bengal father again, when making a partition, can allot any shares he chooses to his several sons, and can even disinherit them. He can make a will, disposing of the ancestral property in any manner he likes.

But under the *Mitāksharā*, a son has an equal right with his father in ancestral property. He can compel his father to divide it during his life-time. An alienation of ancestral property by the father after the birth of a son, without the son's consent, unless for a legal necessity, will not bind the son. The son's right to the ancestral property is wholly independent of and equal to that of the father. He does not claim through him. If the father during the minority of the son alienates any property in fraud of his creditors, such fraud would not bind the son, who was neither a party, nor a privy to the fraud, (7 W.R. 502, Babu Bir Kishore.)

Then again, under the *Mitākshara* law, the right of survivorship has its operation in every joint family. The rule with regard to survivorship is, that females do not succeed in a joint family; but if a member dies leaving no son, grandson, or great grandson, the joint property goes to his co-sharers. Neither his widow nor his daughters, nor his mother or grandmother, succeeds to his share. His interest in the joint property is said to lapse or to survive to the other members. To this rule, there is this exception, that the separate property of a member is succeeded to by the female relatives named above, as was decided in the *Sivagunga* case (See ante p. 96).

Hence in every case of a *Mitākshara* family, the courts

have to decide two very important questions;—(1) whether the family is divided or undivided ; (2) whether the property is joint or separate.

As regards the first question, it is said in the *Mitákshará* that a dispute as to partition or no partition is to be settled by the evidence of paternal or maternal relatives, or of unrelated witnesses. A deed of partition, where it exists, is also good evidence. Partition is further proved by houses or fields being separate, or religious rites, or business and transactions being separately performed. The *Vyāvahāra Mayúkha*, the Bombay treatise, says that if a member declares, 'I am separate,' that would constitute a legal separation. (3 W. R. 41, Bolaki Lal). The leading case upon the subject is that of *Appoovier*, 8 W. R. P.R. p. 1. It lays down that when the members of an undivided family have agreed among themselves with regard to particular property, that it shall henceforth be a subject of ownership in certain defined shares, then the character of undivided property and joint enjoyment is taken away from the subject matter agreed to be so dealt with. Each member then has a certain and definite share, which he may claim to enjoy in severalty. Although the property itself has not been actually severed and divided, a deed of partition is quite sufficient to convert undivided into divided property. To constitute separation, property need not be divided by metes and bounds, The error in supposing that a division by metes and bounds is indispensable, confounds the division of the title with the division of the subject to which the title applies. An *ikrarnama*, reciting that the profits shall be shared in such and such proportions, although stating that the business shall be carried on jointly, effects a separation (8 W.R. 116, Lalla Mohabir Prosad). But separation from commensality, does not as a necessary consequence, effect a division of property, so as to destroy the right of survivorship, (7 W.R. P.R. 37, Rewan Pershad). Again, even in the absence of a written agreement, evidence showing that the members divide the profits in certain proportions would prove sepa-

ration, because it proves a tacit agreement to hold the property in separate shares. (23 W. R. 397, Cheyt Narain Singh). On the other hand, simply because a suit was brought, asserting a right to a certain portion of the ancestral estate, and impeaching an alienation effected by the father, it does not create a separate title, so as to destroy the right of survivorship. (Padarath Singh, I.L.R. 4 All 236). In a family consisting of two cousins, one separated himself in food from the other, left his paternal home on account of ill usage received from his cousin, and brought a suit to establish his right, in which he got a decree, which was appealed up to the Privy Council. Pending the Privy Council Appeal he died, and the question arose, whether his share was to be inherited by his widow, or was to survive to the other cousin. It was held that a complete separation had been effected by the legal proceedings, and that the right of survivorship had no application, (25 W. R. 355, Joy Narain Giri). In a dispute between two brothers who composed a joint family, there was a decree of Court declaring that the younger brother was entitled to a moiety of the estate. The Privy Council held that this decree had effected a separation between the brothers, and that although the younger brother died before effecting an actual partition by metes and bounds; and it was held that a complete separation had taken place between the two brothers, the result of which was that the interest of the younger brother passed, not to his elder brother by survivorship, but to such relations as were heirs to his separate estate. (5 C. L. R. 6, Chitham Baram). On the other hand the Bombay High Court have held that when a decree had been passed in a suit between an uncle and a nephew who composed a joint family, which declared that each was entitled to one half of the joint estate, the separation had not been complete before the execution of that decree. The Court therefore on the death of the uncle before such execution, rejected his daughter's claim to his half of the property. (I. L. R. 4 Bom. 158 Babaji Parashram). The same High Court held

in another case that a decree for partition does not effect a separation until it becomes final by being upheld by the Appellate Court. (I. L. R. 6 Bom. 115, Sakharam). These two decisions run counter to the Mayúkha doctrine (See ante 99) that a mere declaration effects a separation.

With regard to the other question, namely, what property is to be considered as separate, the following cases will throw light upon it.

In every case, the *onus* is on the party who claims certain property to be separate, and not joint. The best proof is to show that it was purchased by separate funds. The mere purchase in one member's name, or the fact of rent receipts having been in his name, is insufficient to shew exclusive right; for such facts are consistent with the property being joint. Acts of ownership openly exercised by or on behalf of one member and assented to or not opposed by other members are equally equivocal; for such acts may be beneficial to the joint estate, or necessary for its protection. But when the acts of ownership amount to assertions of sole ownership in exclusion of all joint right or interest in the other members, and are of a kind beneficial to the individual member alone, the acquiescence of the other members, unless clearly explained, is a strong admission, in support of the separate and exclusive right. If A, a member of a joint family, is shown to have a separate employment yielding him a given income, and he buys land in his own name at a price not wholly out of proportion to the sum which his separate income may fairly be supposed to place at his command, the deed being registered, and the land held openly as his exclusive property and the proceeds applied to his own use without the interference of the other members, these facts would be sufficient to establish the land so purchased to be A's separately acquired estate. (5 W. R. 85).

Subsequent acquisitions made by a Mitáksharā father out of assets and profits of ancestral estate are not separate,

but joint property. (6 W. R. 256 Sadanand) Landed property acquired by a Mitákshará grand-father and distributed by him amongst his sons, does not by such distribution become the self-acquired property of the sons ; but the grandsons have a right to it. (6 W. R. 73, Muddon Gopal). Property purchased by the father out of the income of ancestral property, at a time when no son was born, is the separate property of the father. (9 C. L. R. 422, Gangaprosad). Property awarded to the junior members of the family by way of maintenance, becomes their separate property (17 W. R. 129, Gocoolanand)

DISQUALIFICATION.

THE Law of Disqualification is peculiar to the Hindu jurisprudence. It is laid down in that law that physical defects in the person of individuals would exclude them from inheritance. Yájñavalkya, Ch. 2, Sloka 143, says, that an impotent, person, a cripple, a lunatic, an idiot, a blind man, one afflicted with some incurable disease, and similar other individuals, have no right to a share, but should be maintained. This list thus being illustrative, not exhaustive, we must supplement it, by adding the leper, the deaf, the dumb, and one defective in some sense, called a nirindriyá in Sanscrit.

An impotent man is he who is without virility or who is a eunuch or a hermaphrodite. In every case law will presume against disqualification ; (22 W. R. 348, Futeek Chunder) ; therefore, impotency, will have to be affirmatively proved by the party who wishes to exclude another on that ground. That being very difficult, this ground of disqualification has hardly any practical importance. The word 'cripple' is 'pangu' in Sanscrit ; the Mitákshará explains it as one who in walking does not make use of his legs. Mere lameness, or a limping gait, is no disqualification. With regard to the leper or one afflicted with an incurable disease, the

following decision may be consulted with profit (2 W. R. 125, Issur Chunder Sein). In this case, it was attempted to exclude a widow on the ground of leprosy and incurable disease. The judges observe :— “Persons, who under ordinary circumstances, would undoubtedly inherit, should not have their claim lightly set aside on the ground of disease ; * * there must be the clearest and most unquestionable evidence. It is no cause of disinherison, because a native doctor has sworn that the widow has atrophy of bones, which is an incurable disease ; because such a doctor, by treating her for six years, has been unable to cure her.” If the leprosy be of the virulent type, which is ordinarily regarded as incurable, it is then that the same will work exclusion. (I. L. R. 1 Bom. 554, Ananta). With regard to lunacy or insanity, Couch, C. J. has said :— “The evidence shows a state of madness for a long period of time, and certainly, if not without an absolute possibility of cure, without a probability of it. It is not necessary to show, by clear and positive evidence, the absolute impossibility of a cure. If one is a madman, when the succession falls in, he, not being in a condition to offer funeral oblations, will be excluded, as that is the reason for the exclusion.” (18 W. R. 305, Dwarkanath). Insanity need not be congenital, in order to work exclusion ; the fact of there being insanity at the time of the succession opening, will be sufficient to disqualify the lunatic. (I. L. R. 8 Cal, 153, Ram Sahye ; I. L. R. 5 All. 512, Deo Kishen.) It has been said in the latter decision, that the subsequent cure of the disease of insanity will not entitle the former mad person to claim his due share. But this observation runs counter to the *Mitákshará*, where it is said ; Ch. 2, S. 10, verse 7).—“If the defect be removed by medicament or other means, at a time subsequent to partition, the right of participation takes effect, by analogy to the case, of a son born after separation.” This analogy refers to the provision in the law of partition which says that when the pregnancy of the widow of one of the coparceners is not known

at the time of the partition, a second partition should be made in order to allot his proper share to the newborn child, if it proves a son. Allied to lunacy is idiocy; idiots being persons of a naturally defective or imperfect understanding; whereas lunacy is a disease of the mind that supervenes at a time subsequent to birth. Born idiots are incapacitated from inheriting (7 W. R. 5, Goureenath). In Bengal, it is settled law, that blindness, unless congenital, causes no exclusion. Therefore, when it supervened two years before the succession opened; it was held that the person so become blind could not be excluded on the other ground of being a Nirindriya, *i. e.* 'a person who has lost the use of a sense'; for such a person is included in the list of the disqualified. The Court said that in order to show that a party has lost the use of a sense, it must be shewn that he has become absolutely and incurably blind. (23 W. R. 78, Mohechunder Roy).

We have seen, while dwelling on the subject of inheritance, that if a born blind man be excluded from inheriting his father's property, and then a son is born to him free from all personal defects, this son will not take any share of the property, which, before his birth, became vested in his uncle. Here the principle applied was that an estate once vested cannot be vested. (11 W. R. O. J. 11, Callydass Dass). Principle was again applied to the case of a deaf and dumb person. (1 B. L. R. 117, Poresch Money Dossee).

The list of disqualified persons also includes one who in Sanscrit texts is called 'a fallen person' that is, one who has become sinful by committing some sin. But since the passing of Act 21 of 1850, this has ceased to be a ground of exclusion, as that Act provides:—"So much of any law or usage now in force within the territories subject to the government of the East India Company, as inflicts on any person forfeiture of rights or property, or may be held in any way to impair or affect any right of inheritance, by reason of his or her renoun-

cing, or being excluded from the communion of any religion, or being deprived of caste, shall cease to be enforced as law in the Courts of the East India Company, and in the Courts established by Royal Charter within the said territories." There are various sins by which a person becomes fallen; but none will be a disqualification for inheritance, however heinous it may be.

PARTITION.

And, first, partition, according to the *Mitákshará*. This treatise says, that partition respects two classes of property, ancestral, and what were the self acquired properties of the father. Again, a partition is made by the father with his sons; and a partition is made by the sons after the death of the father. In the former case, the father cannot make any unequal division of the ancestral property, his right being equal to that of his sons. With regard to the time for partition, the *Mitákshará* says that the father can make a partition when he chooses; a second period for partition is when the mother is past child-bearing, when the father's worldly inclinations have ceased, and his sensual powers are extinct. A third period is when the father is vicious, or afflicted with a protracted illness,

At the time of a partition by the father, his wives each get a share equal to that of a son; or if they have previously received any peculiar property given to them by their husband or father-in-law, as much should be given to each wife of the father as would make up the difference between what they already have and what each son gets. The other kind of partition is that made by the sons, when also each of the father's widows gets a share equal to that of a son. This is the opinion of the *Mitákshará* and the *Madanaratnákara*, though many other authorities of the Benares school say that after the death of the father, the widows who have no sons of their own do not get anything but maintenance. (See *Viramitrodaya*, p. 79,

English Translation.) At a partition after the death of the father, the unmarried daughter gets an one fourth share, under the Benares law ; (See Tagore Law Lectures, 1885, p. 143) but in the District of Tirhut, only a marriage portion is all that an unmarried daughter is entitled to get. It has been held that their marriage portion must be of such an amount as to procure a suitable match. (10 C. L. R. 403, Damodur Misser).

Under the Bengal school, the father is the absolute master of both the ancestral and the self-acquired properties. Over and above, if he divides the property with his son, then he will get a share in son's acquisitions. If the son has made these acquisitions without the help of paternal property, then at a partition with the son, such acquisitions are divided equally between the father and the son, who made the acquisitions. If, however, the acquisitions were made by making use of the paternal property, all the other sons take a single share out of it, but the father and the acquirer each takes a double share (Dáyabhága, ch. 2, para 73). After their father's death, sons will divide the whole property at any time when partition is demanded by any one of them. A mother or a grand-mother receives an equal share when sons or grandsons divide. But a stepmother receives only her maintenance. It has been recently held by the High Court of Calcutta, that when sons by different mothers have divided, the mother, respectively will receive their maintenance from their own sons, and not from their stepsons. The following cases will throw light upon the subject of partition.

Under the Mitákshará, the mother or the grand-mother gets a share when sons or grandsons divide ; but before the division is actually made, she cannot be recognized as the owner of any share ; she has no pre-existing right in the estate, except of maintenance. She acquires property by partition, for partition is one of the recognized modes of acquiring property under the Hindu Law. But in her case, partition is the sole cause of her proprietary right. (9 W. R. 61, Sheo. Dyal.).

In a legal partition of ancestral estate under the Mitákshará, the father takes a share, and each of his wives and sons takes a share. The subsequently born son takes the whole of his father's and mother's share (11 W. R. 480, Horodut Narain). Although when a partition does take place, a wife in a Mitákshará joint family is entitled to a share, she has no right herself to take the initiative and demand a partition (10 C. L. R. 79 Sundar Bahu). The father under the Mitákshará, may, during his life partition the whole of the property in his hands, or any of it. If he does so, he must allot a share to his wife for her maintenance, in addition to the share taken by himself. The sons also can, at any time during the father's life, at their pleasure, call upon their father to partition the ancestral property. In that also, the mother must have her share, as before. After the father's death again, the sons may divide the property among themselves. Then too, they must give a share to their father's widow, and to an unmarried sister, if there is one. In all the cases alike, the mother's share in the ancestral property must be equal to that of a son. (20 W. R. 340, Lalleet Sing). At the partition, both of the paternal and of the ancestral property by the father in his life time, he must give his wives equal shares ; or if they previously have had separate property, half a share. (20 W. R. 195, Mohabeer Pershad). The mother of minor sons in a Mitákshará family, can sue the father for a declaration of the right of partition, under circumstances which show that the interests of the minors might be otherwise jeopardized ; as, for example, when the father had mortgaged the family property. In such a case, the mortgage might or might not have been made under a legal necessity. But on either supposition, in order to avoid future complications, it is often desirable that the interests of the sons in the family property should be kept separate from those of the father. (25 W. R. 497, Muss. Lekraj Kooer). A Hindu intestate left him surviving, two widows, one son by one, and two sons by the other. It was held that there should be four shares, one of which was

to be taken by the two widows together by way of maintenance. (4 C. L. R. 161, Toritabhushan). When a father and his son divide ancestral property between themselves, the mother is entitled to an equal share. (9 C. L. R. 415, Sumrun Thacoor).

ON RIGHT TO MAINTENANCE.

In Bengal, the father's power of disposal over even ancestral property being absolute, the sons cannot demand maintenance from the father. It has been held that an adult son in Bengal has no right to demand maintenance from his father; that there is no authority for saying that the father is under an obligation to support a grown up son. (12 W. R. 494, Premchand Pepara). In this case, it is not clear, whether there was any ancestral property in the hands of the father. Sir Barnes Peacock, in deciding against the right of the daughter-in-law to receive maintenance from the father of her deceased husband, lays stress upon the fact that the father-in-law had no ancestral property in his hands. (9 W. R. 423, Khettermoney Dasee.) From this, it would seem that the possession of ancestral property by the father would make a difference. I therefore apprehend that even in Bengal, if the father be in possession of ancestral property, an adult son may demand maintenance from him, so long as the father has not alienated it to strangers. When, however, the father has done so, the son cannot charge the ancestral property in the hands of a third person with his maintenance.

Under all the schools, the wife is entitled to receive maintenance from her husband, so long as she remains chaste and obedient to him. It has been held by the Allahabad High Court, that a wife is in a subordinate sense a co-owner with her husband; he cannot alienate his property, or dispose of it by will in such a wholesale manner as to deprive her of her maintenance. (I. L. R. 2 All. 317, Jamuna). In this case, the husband had made a gift of his whole property to his nephew, without

having made any provision for his wife's maintenance. The High Court held that the nephew was bound to maintain his uncle's widow. But if the husband alienates the whole of his property with a view to provide for the payment of his just debts, then the wife cannot demand maintenance to be made a charge upon property so alienated, inasmuch as the payment of her husband's debts, whether he be alive or dead, must take precedence of a wife's or widows' maintenance, which maintenance cannot stand in the way of sales or alienations being made by the husband during his life or by his heirs after his death to satisfy his creditors. (I. L. R. 5 All. 368, Gurudyal.) Where the wife was obliged to leave her husband's house under the influence of her religious feelings, her husband having kept a Mahomedan concubine, her conduct was held as justifiable, and she was held to be entitled to receive a separate maintenance from her husband, so long as she lived in chastity with her mother. (14 W. R. 451, Lalla Cobind Pershad). But a Hindu wife cannot leave her husband's house without sufficient cause; in case she does so, she cannot claim a separate maintenance. Again, adultery on her part puts an end to all her right to getting subsistence from her husband, unless her guilt is condoned by him, and she is taken back into the family. Where therefore the wife leaves her husband's house and also commits adultery, of course she loses all her right to maintenance. This rule of law being almost self-evident, hardly a case authority is necessary; though the decision of the Madras High Court in the case of Ilata Sabitri, (Mad. H. C. Rep. 372,) may be cited; it says that a wife's departure from her husband without sufficient reason exempts him from the duty of supporting her, and her elopement with adultery discharges him from all obligations to find her necessaries, and he will not be bound by her contracts for them, unless of course he pardons her and takes her back. The latter part of the decision alludes to the rule of law, that when one person is bound to maintain another, he is bound to pay all such debts

that the other contracts for the purposes of maintenance. Thus a chaste wife, causelessly discarded by her husband, may buy rice for her food from a shopkeeper, and the latter can sue the husband for the price ; so the dealer in cloth may supply the discarded wife with clothing, and then sue the husband for its price. But a person dealing with a wife and seeking to charge her husband, must shew either that the wife is living with her husband and managing the household affairs, in which case an implied agency to buy necessities is presumed, or he must shew the existence of such a state of things as would warrant her in living apart from the husband and claiming support and maintenance ; when of course the law would give her implied authority to bind him for necessities supplied to her during such separation, in the event of his not providing her with maintenance. • Because the husband marries another wife, the first wife would not be justified in separating herself and remaining apart from him of her free will. Any debts contracted by her under such circumstances would not be binding upon her husband. (1 Mad. H. C. Rep. 375, Virasami). To a similar purport is also a Bengal decision. (24 W. R. 377, Sitanath Mukerji). There the husband was a Kulin Brahmin ; the first wife who brought a suit for separate maintenance alleged that she had been compelled by her husband's cruelty to leave his house, and seek a home with her paternal relations. The facts were that she had been married at seven years of age, and for several years had lived happily with her husband, after which the latter having married a second wife, a rupture had taken place, chiefly because the two wives could not agree. On one occasion the first wife was repulsed by her husband with some show of anger and impatience, and was pushed with his hands away from himself. It was held that this was no justification for her leaving her husband's house, the Chief Justice Garth remarking :—"A wife's first duty towards her husband is to submit herself obediently to his authority and to remain under his roof and protection." Nothing short of cruelty

justifies the wife in leaving her husband; mere unkindness or neglect on his part being an insufficient reason for so doing; though it is difficult to say what would amount to legal cruelty on the husband's part so as to justify the wife to leave him. Not speaking to her, or not consorting with her, is not such cruelty. There is a provision in the Criminal Procedure Code connected with this matter, which says that the husband will be ordered to maintain his wife who refuses to live with him, if there is satisfactory evidence that the husband is living in adultery, or has habitually treated her with cruelty. As regards husband's marrying a second wife, Yajnavalkya says (Mitak. Ch 2, Sec. 11, para 34) that a superseded wife must get some money on account of her supersession, which will be equal in amount to what the husband spends on the occasion of his second marriage. But it may be doubted whether mere marrying a second wife amounts to a supersession, though the word in Sanscrit (अधिबेदन) would seem to imply simply the taking of another wife when one is living.

Under the Mitákshará system, the husband's property is sometimes charged with the maintenance of his wife and sons. If such property is sold to a stranger, the wife may sue him for a declaration that maintenance may be awarded to her from the property in the hands of the stranger. But as debts of the family must be paid from the family estate, neither the wife nor the son can demand maintenance from the profits of the property sold, if the sale had been necessitated by family exigencies. (I. L. R. 2 Mad. 127, Natchiar Amma). Wife's right to maintenance extends even to the self-acquired property of her husband, as held in a Bombay case where the husband gave a house to his son, after having taken a release from the wife that she would not assert her right of maintenance against that house. Even this release by the wife was held to be inoperative. The judges remarked :—"Usage as well as the law of the Sastras prescribes her submissive dependence. A release to her husband in return for a bare maintenance, to which she

was already entitled, of something going far beyond that maintenance, fails to satisfy the essential conditions. Her position would thus remain after the release what it was before." (I. L. R. 5 Bom. 99, Narbada Bai)

In Bengal, if a wife leaves her husband's house without his sanction to live with her paternal relatives, cannot demand separate maintenance from him. (6 W. R. 116, Kallanessuree.) But where the wife had left her husband's house and had earned her living by working as a day-labourer without any objection or protest on her husband's part, or any offer to her to come back to his house, it was held that her right to maintenance revived, if she again expressed a desire to come back to her husband's house, provided of course she had remained chaste. (9 W. R. 475, Nitai Laha).

Under the Mitāksharā law, a widow's maintenance is charged upon the property of her husband, even though the property is sold to strangers. (15 W. R. 263, Muss. Khukroo). The Privy Council have held that the maintenance of the widow was a charge upon the inheritance which had descended from her husband to her daughter-in-law; that the liability to maintain the widow passed to the son when he inherited the property from his father; and that when the estate passed from the son to the son's widow, the liability to maintain the father-in-law's widow still attached to the inheritance. (L. R. 2 I. A. 279, Baijan Dobey). In Bengal also, it has been held that the widow's right to maintenance becomes by the death of her husband an actual charge on the estate which devolves upon the husband's sons. (2 I. J. N. S. 124, Ganga Bai). As against the heir who has taken the property, the widow has a right to have her maintenance treated as a charge upon the property, and she may follow the property in the hands of any one who takes it with notice of her right to maintenance. But she has no lien upon the property for maintenance irrespective of notice. (8 B. L. R. 225, Bhagabati.) Where a purchaser purchases property from the heir with notice that a Hindu widow is en

titled to be maintained out of it, the property in the hands of the purchaser continues to be charged with that maintenance. In some cases, where sufficient property is still, after the sale, in the hands of the heir-at-law, probably the heir ought to be first sued by the widow for maintenance, if only a small portion of the inheritance has been sold, and come into the hands of a purchaser. But if the widow fails in getting maintenance from the heir, she can sue the purchaser. Nor is it necessary for the widow to sue the heir at first in every case. (25 W. R. 100, Babu Goluk Chunder). In asserting the charge for maintenance against her husband's property, the widow has 12 years from her husband's death, within which she will have to bring her suit. (7 Mad. H. C. Rep. 226, Subramaniya). Where property had been sold in execution of a decree against the younger brother of the widow's husband, it was held that the execution purchaser having had notice of the widow's claim, the claim against the property so sold had been transferred to the surplus proceeds of the execution sale. (I. L. R. 1 Cal. 365, Adhirani). The widow's claim to maintenance is one of an indefinite character. The heir who succeeds to the estate takes it with a trust for the widow's support. It gives her a right against him to have the allowance ascertained and fixed, and made chargeable upon particular property. But till that has been done, a *bona fide* purchaser without notice, will not have to make allowance from the purchased property. The principle of protecting a *bona fide* purchaser is not confined to English law; it rests on grounds of public convenience, which are of universal application. (I. L. R. 4 All. 299, Shamlal).

Connected with the widow's right to maintenance is her right to residence in the family dwelling house. The leading case is *Mongola Devi V. Dinonath Bose* 4 B. L. R. O. C. J. 73. It rules that a son, whether natural born or adopted, is not entitled to turn out the widow of his father from the dwelling house selected by the father for his own residence, and in which he left the females of his family at the time of his death. As

the son himself cannot turn out his father's widow, a purchaser from the son is similarly incompetent to do so. This principle was extended to a case where the dwelling house was the joint property of two brothers governed by the Mitákshará, and the auction purchaser of the share of one of the brothers wanted to turn out the widow of the other. The court disallowed it. (I. L. R. All. 262, Gowri.)

A widow does not forfeit her right, either to her husband's property or to her maintenance, simply because she does not choose to live in the house of her husband's family, unless she leaves it for unchaste purposes. This has been repeatedly ruled by the Privy Council. (See 20 W. R. 22, Prithee Sing; and the earlier cases noticed in it.) A widow is not bound to reside with her husband's relatives; they cannot compel her to live with them. Chastity is the only duty imperative on her. Herein she differs from the wife; for a wife cannot leave her husband's house when she chooses; she cannot require her husband to provide her maintenance elsewhere. But all that is required of a widow is that she is not to leave her husband's house for improper or unchaste purposes; she retains her maintenance unless she is guilty of unchastity or other disreputable practices after she leaves her husband's residence. Somewhat contradictory to the above are the following observations of the Privy Council, to be found in their judgment in the case of Sri Virada Pratapa, I. L. R. 1 Mad. 81—"The joint and undivided family is a normal condition in Hindu society. An undivided family is ordinarily joint not only in estate, but in food and worship; therefore not only the concerns of their joint property, but whatever relates to their commensality and their religious duties and observances, must be regulated by its members, or by the manager to whom expressly or by implication they delegated the task of regulation. The Hindu wife upon her marriage passes into and becomes a member of that family. It is upon that family that as a widow she has her claim for maintenance. It is in that family that in strict contemplation

of law, she ought to reside. It is in the members of that family that she must presumably find such counsellors and protectors as the law makes requisite for her." It has been held in Bombay. (I. L. R. 4 Bom. 261, Ramchander Vishnu Bapat) that where the joint property was exceedingly small, the widow of one member of the joint family cannot sue the surviving members for a separate maintenance; she in such a case must make up her mind to reside in the same house with them, and receive food and raiment in kind.

With regard to the amount of maintenance which a widow ought to receive, the law is that it is not necessary to maintain a widow in the same state in which her husband would maintain her, that there is no general rule upon the subject, and that Rs. 800 out of an income of Rs 7000 was not an improper amount. (4 W. R. 65, Kaliprosad.)

Besides the widow, both the mother and the grand-mother are entitled to maintenance from the property of their respective husbands if that property has been inherited by persons other than themselves. The general rule upon the subject of maintenance is that if one person intercepts another's right of inheritance to the property of a third person, the first is liable for the maintenance of the second. This rule has been thus enunciated in the Viramitrodaya (p. 173, para 2). "In every instance, the person responsible for the widow's maintenance is one who has appropriated the husband's property, for the liability to give maintenance is incident to the participation of wealth." Where the husband dies leaving a widow and sons, the sons intercept the widow's inheritance; for if there had been no sons, the widow would have inherited; therefore the sons are bound to maintain the widow. Again, where one leaves his mother and sons, the mother does not inherit the property on account of the sons' existence; therefore the sons are liable to maintain the mother, that is, their own grandmother. Again if one leaves his widow and his mother, the widow intercepts the mother in inheriting the property; therefore the widow must

maintain the mother, that is, her own mother-in-law. In general, therefore, A's heirs must maintain all such persons as were legally or morally entitled to be maintained by A.

In Bengal, however, if the son predeceases his father, the son's widow cannot demand maintenance from her father-in-law, unless the father-in-law has inherited property from his deceased son, namely, the widow's husband. (*Khettermoney Dassee V. Kashinath Dass*, 10 W. R. F. B. 89). A father can inherit from his son, if the son's widow be a disqualified person, in which case he must maintain her. In the above case of *Khettermoney*, we must remember that the point decided was that the son's widow cannot ask for a money allowance by way of maintenance, if she refuses to live under the guardianship and protection of her father-in-law.

Under the *Mitákshará* however, the widow of every member of a joint-family being entitled to be maintained from the joint ancestral property, a daughter-in-law can as a matter of course demand maintenance from her father-in-law, if she can shew that there is any ancestral property in his hands (*Lalti Kuer*, H. C. R. N. W. P., 1875, p. 261). Conversely, when there is no ancestral property in the father-in-law's hands, the daughter-in-law cannot demand maintenance. (I. L. R. 1. All. 174, *Ganga Bai*). The right of a grand-mother is similar to that of a widow; that is, she must be maintained by her grandson if any property of her husband has descended to that grandson. (12 W. R. 409; I. L. R. 3 Mad. 191). The latter case also says that the grand-mother can ask the Court to fix some specific property to be charged with her maintenance. The daughter's right to maintenance is recognized in *Kuloda Debya*, 12 W. R. 453, where the judges say that if the property is held jointly, the widow or the daughter under the *Mitákshará* does not succeed, but has a right to maintenance. In *Venkatammal*, I. L. R. 6 Mad. 134, it is said.—“The mere right to maintenance does not create a lien on the family property. To affect a *bona-fide* purchaser, the right must have been ascertained by contract, or by a decree

of court, and charged on specific property. Therefore, if the family property is sold in execution, and the widow gives no notice of her right to maintenance, the execution purchaser is protected, but the widow may have a charge upon the surplus proceeds of the sale. The best course for a widow is, that as soon as her husband dies, she should demand that a specific portion of the property in which her husband had an interest should be set apart for her maintenance. If such specific charge is not fixed by the heirs in an amicable way, she has a cause of action, as will appear from I. L. R. 1. Cal. 365 ; I. L. R. 2 Bom. 494 ; I. L. R. 4. All. 299, Once her maintenance being fixed as a charge upon particular property, any disposition of the same by the male members of the family will leave it unaffected and her maintenance will rest safe and secure. In framing such a suit, it is advisable for her to include also her right to residence, in other words, to ask that a residence may be assigned to her. (See. I. L. R. 1. Cal. 365, I. L. R. 2. Bom. 494, I. L. R. 4. All. 299.)

ON PRESUMPTIONS AND LIMITATION AS CONNECTED WITH HINDU LAW.

These presumptions are as follows:—I. Every Hindu family is to be taken as joint, unless the contrary is proved. II. The property in the possession of any member of such a family is to be presumed as joint, unless the contrary is proved. As deductions from these two principles, it may be laid down that if property is purchased in the name of one member, and receipts for rent stand in his name, still the state of things is consistent with the notion that the said property is joint (6 W. R. P. R. 43, Dhurmodus). The normal state of every Hindu family is joint. Presumably every such family is joint in food, worship, and state. (12 W. R. P. R. 21, Neelkisto Deb.) But it is necessary to show in every case that there was once a

family to which the parties to the suit belong. (I. L. R. 9 Cal. 237, Abhaycharan.) Where brothers, after they have once separated, re-united, and the eldest brother managed the joint estate, received the collections, and purchased talooks with the profits of the joint-estate, the re-united younger brothers were held to have a right in these purchases. (5 W. R. P. R. 11, Prankishen). In some cases, it was held that the presumption of joint property did not arise, unless some nucleus of joint family property was shown. But these seem to be overruled by the decision of the chief justice Couch in the case of Tarakehunder Totadar, 19 W. R. 178. It is said there :—

The judicial committee of the Privy Council have laid down that every Hindu family is presumably joint in food, worship and estate; and that the family is to be presumed as having remained undivided. When the family is possessed of property, all property in the possession of the family is to be presumed as joint. The rule is that the possession of one member is the possession of all. The meaning of this rule is that if one member is found to be in possession of any property, the family being presumed to be joint in estate, it will not be presumed that the said member is in possession of it as separate property, but on the contrary, the law will presume that it is in his possession as joint property. The result of this decision is that whenever the parties in a suit are Hindus not very remotely related to one another, by agnatic relationship, the Court is bound to presume that they are a joint family, and that every property in their hand is joint, until the contrary is shown. Where a property had been purchased in the name of the family priest, and one brother attempted to set up a plea of self-acquisition with regard to it, the Privy Council held that the property so purchased must be presumed to be joint, as it was acquired by the managing representative member of the joint family. The burden of proof, therefore, lay upon those who averred that the property so purchased was separate. (19 W. R. 231, Chand

Hurce). But this presumption of the continued unity of the joint family does not apply when a disruption of the unity has already taken place, by one of the members having separated from the rest. In such a case no inference ought to be made, that after the separation of one the rest remained joint. The reason is that even one member cannot separate from the rest, unless the shares of all are ascertained at the time. Such an ascertainment of share is equivalent to a partition. (I. L. R. 5 Cal. 474, Radhacharan Das). So, after separation in mess, the presumption that a purchase made by a single member is joint is considerably weakened. (3 Shome 77, Sunker Ram).

With regard to limitation as affecting the principles of Hindu Law, the following cases will illustrate the topic. In a joint family, the possession of one is held to be possession for all; therefore, if an individual does not exercise actually his right to possession, that is, does not do any act of possession, still his right will not be barred. Therefore, when a member received Rs. 3 during the last three years out of the profits of land, his right to the land was held as subsisting. (3 W. R. 173, Ambicacharan). Where one of two brothers died, leaving his widow as his heir, who did not enjoy possession of her husband's share, the property in the possession of the surviving brother for 30 years, it was held that the widow's right had not yet been barred, since the possession of the surviving brother could not be adverse to her. (6 W. R. 170, Baydonath, 16 W. R. 42, Deepo Debya). Receipt of rent by one member of the family is consistent with the right of all. Such receipt is not adverse to the right of others. (19 W. R. 231, Chand Harree). When the widow and her daughter continued to live in the family dwelling house, the presumption was that she was maintained out of the profits of the family property, and this would be sufficient to keep her right alive. (23 W. R. 214, Amirtolal). The present enactment on the subject of limitation says that a suit by a Hindu excluded from joint family property to enforce a right to share in them must

be brought within 12 years from the period when the exclusion becomes known to him. This is the purport of Article 127, of Act. 15 of 1877. Under this provision of law it has been held, that simply because immoveable property has been held by one member for 15 years, the right of another member to get a share in it would not be barred. If the second member has not made a claim, and been refused, no exclusion from the property within the meaning of Article 127, can be said to have taken place, or to have been known to him. (I. L. R. 6 Bom. 741, Hari). If a man dies leaving two widows, and if the younger receives an allowance from the elder, out of the husband's estate, the possession of the property by the elder is not adverse to the right of the younger widow (12. W. R. 158, Jadubunsee Kooer.) The law of two widows inheriting their husband's property together is that the estate of the two is considered as a single estate. The right of survivorship is so strong, that the surviving widow takes in exclusion even of the daughters of the deceased widow. They are therefore in the strictest sense of the term coparceners; and between undivided coparceners, there can be no alienation by one without the consent of the other (9 W. R. P. R. 23, Bhagavandeen.)

ON WILLS BY HINDUS.

No mention is found in the original authorities of Hindu law of anything like a testamentary power, a power that is, by which the owner of property can make future arrangements as to how his property will be disposed of after his death. But the power has gradually grown up as part of the customary law of the land, the custom having been most probably adopted from the practice among the Mahomedans after they had established their rule here. At the present day, numerous decided cases have determined that the testamentary power exists among the Hindus, that it may be

exercised within the limits which the law prescribes to alienations by gift, *inter vivos*. Accordingly it has been settled that even in those parts of India which are governed by the stricter law of the Mitákshará, a Hindu without male descendants may dispose by his will of his ancestral property in which he is not joint with any other person, and a Hindu with male issue born to him, may dispose by his will of his separate and self acquired property, whether moveable or immoveable (9 W. R. P. R. 15, Beer Protap.) As regards self acquired property, under the Mitákshará, it may be disposed of by will to the extent of even altogether disinheriting a son. Such a disposition is not properly a partition, and therefore the prohibition against unequal distribution does not apply to such a case (10 W. R. 287, Bawa Misser). Hindu wills being governed by the principles which relate to gifts, it has been held that, a gift is improper unless it is made with the concurrence of those who are interested in the succession to the property which forms the subject of the gift. But in Bengal, this impropriety is only moral, not legal, it does not affect the validity of the gift. In Bengal, the power of gift extends over both the ancestral and the self acquired property, to the immoveable and the moveable ; the only restriction is that the donee must be a sentient being (ch. 1, para 21, Dáyabhágá), gift being relinquishment in favor of some sentient being. Wills are a kind of gift. Formerly doubts existed as to the existence of testamentary power among the Hindus. But the doubts have been dispelled by a course of practice, in itself, enough if necessary to establish an approved usage. There have also been a series of judicial decisions, passed by both the Privy Council, and the Courts in India. These decisions have proceeded upon the assumption that gifts by will are legally binding. Decisions in fact recognize the validity of this form of gift as part and parcel of the general law. The introduction of gifts by will into general use has followed in India, as it has done in other countries, the conveyance of property *inter vivos*. A person capable of taking

under a will must be such a person as could take a gift *inter vivos* and therefore must either in fact or construction of law be in existence at the death of the testator ; for a will is to be considered under the Hindu Law as a gift operating at the moment of the testator's death. The condition that the donee must be in existence at that moment is not inconsistent with the validity of provisions made by way of contract or of conditional gift on marriage or other family provision, for the validity of the like provisions, authorities may be found in Hindu Law or usage. Such provisions involve the principle governing trusts. These trusts come into being when property whether moveable or immovable, is for any purpose vested, more or less absolutely, in some person or persons for the benefit of other persons. Various kinds of such trusts are recognized and acted on in India. But under the Hindu law, as gifts cannot be made to a non-existent person, property cannot be bequeathed to a person who is yet unborn at the time of the testator's death. Similarly, property cannot be so disposed of by will as to be for ever regulated, so far as its succession is concerned, by some special rules other than the ordinary law of inheritance and succession ; an individual member of society is not competent to make a law, whereby a particular estate created by him shall descend in a novel line of inheritance, different from that prescribed by the law of the land. An estate in tail male, is unknown to and unauthorized by Hindu law ; such an estate therefore cannot be created or bequeathed by a Hindu in the exercise of his testamentary power. (18 W. R. 359, Tagore V. Tagore.) Hindu wills made after 1871 are now governed by the Hindu Will's Act viz., Act 21 of 1870. This Act extends all the provisions of the Indian Succession Act as regards the interpretation of wills to the wills made by Hindus. But there are certain other rules of interpretation which have been established by case law. The following are a few of these cases. The nature and extent of the testamentary power among Hindus is not to be governed by any analogy drawn from the law of England

(3 W. R. P. R. 17, Bhoobun Moyee). In interpreting the words of a Hindu will, we must look to the intention of the testator, so far as it can be gathered from the whole will being considered together. In all systems of law, the intention of the testator is the element by which we are to be guided in determining the effect of a testamentary disposition. In order to ascertain the intention of the testator, the words of the will are primarily to be considered, but the meaning to be attached to them may be affected by surrounding circumstances, amongst which is the law of the country under which the will is made. If that law has attached to particular words particular meaning, or to a particular disposition a particular effect, it must be assumed that the testator, in the dispositions which he has made, had regard to that meaning or that effect, unless the language of the will or the surrounding circumstances displace that assumption. The will of a testator must, *prima facie* at least, be taken to refer to that which is the subject of his disposition, the property which he has himself to give; and if he has evinced his intention to give that property, very strong and clear language must be required to countervail that intention, and subject the property which he has once given to his further disposition. The character and position of a legatee may well form the inducement to the gift in his favor, but it would be going too far to say that in the absence of express declaration or necessary implication, the extent of the gift can be measured by the legatee's continuing or not continuing to hold that character or that position. The equality among the heirs is the spirit of Hindu law; and if entire equality cannot, in consequence of the disposition in the Will, be attained, the partial attainment of it seems to be more in the spirit of the Hindu law, than its total rejection. (4 W. R. P. R. 114, Soorjeemoney dossee). The meaning of the testator is to be ascertained by the words which he has made use of, having regard to the laws which prevail in India relative to these subjects. Where a testator directed his sons, using the words, "living jointly in respect of food, to take

care of and look after his property, moveable and immoveable, and carry on his trading business,"—it was held that their interest would not be accurately represented by the word 'joint estate', as used in the language of English law. Nor was there any analogy to the case of a testator in England, who gives property to executors for the purpose of carrying on a trade. The estate might rather be said analogous to the tenancy in common which prevails in England. The will in the above case also directed that on the death of a son, if that son died leaving a son, the share of that son was to go to that son's son, and if the son dying left no son, then the share should go down to the survivors. On this part of the Will it was held that the share of profits made during the joint lives of the sons, which belonged to the deceased son, goes over to the heirs of the deceased son, as they would go according to law, since from a consideration of the various terms of the Will itself, there was an absence of all directions on the part of the testator to accumulate the profits, which were the property of the son. (9 W. R. P. R. 1, Prankisto Chunder). A Hindu in making a gift of his property to a childless daughter of himself would be very likely to follow the ordinary rule of inheritance, and would be likely to confer such rights as would be taken by a woman as heiress in such a position. (11 W. R. 497, Guru Prosad). When a Hindu makes a will making his wife the sole owner and executrix of his property, it must be assumed that he had an intention of making a gift of property to her. The fact that he had two infant sons, and that there was no reason why he should disinherit them ought not to lead to an inference that the testator's intention was to make his wife the trustee for his sons. Although a Hindu may be less likely than any other person to disinherit his sons, still his desire and intention to do so may be shown by the disposition he makes of his property. When the husband has given an absolute power to his wife of disposing of his property, it is not an ordinary gift by the husband to his wife, and not amenable to the rules which are appli-

cable to such gifts. (19 W. R. 48 Tarak nath). In construing the will of a Hindu, it is not improper to take into consideration what are known to be the ordinary notions and wishes of the Hindu with respect to the devolution of property. It may be assumed that a Hindu generally desires that an estate, especially an ancestral estate, shall be retained in his family, and it may be assumed that a Hindu knows that as a general rule, at all events, women do not take absolute estates of inheritance, which they are able to alienate. Where the words were, "My son's widow shall be heir and malik" and "To her, her two daughters shall be heir and malik," it was held that only a Hindu widow's estate passed under the words. A petition to the Collector by the testator, stating who shall be heir, was held in this case to be a testamentary document. (22 W. R. 409 Maulavi Mahommad). According to the case of Tagore V. Tagore (18 W. R. 359) if an estate were given to a man simply without express words of inheritance, in the absence of a conflicting context, it would carry an estate of inheritance, under the Hindu law. When there is no ambiguity in the language of a will, and the meaning and intention of the testator are beyond all doubt plain and evident, it is hardly worth while to refer to the surrounding circumstances. Gift to a female does not necessarily mean a limited gift, nor carries with it the effect of creating an estate exactly similar to the widow's estate, under the law of inheritance. (24 W. R. 395, Muss. Kollany Koer).

In a case from Bengal, where the provisions in the will were, that the sons should live joint in food, and should carry on the trading business, and where there was no direction to accumulate, but on the contrary, there was direction to the effect that should the sons disagree, then after making certain directions as to the application of the income, the surplus was to be partitioned equally among the sons, the intention of the testator was held to be directly opposed to any accumulations, but that the sons were entitled to these

in equal shares, and that the legal heirs of the sons would be entitled to their shares of the accumulations after the sons' death. These accumulations might be the joint property of the sons of the testator, still they would pass, at the death of any one of the sons, to his ordinary heirs. The will of the testator could operate upon the corpus of the estate as it was left by the testator at the time of his death, and not upon the subsequent accumulations, they not being in existence at the time of the testator's death. The rule of Hindu law that the increment follows the corpus where the parties are joint in estate, cannot be carried to this extent, that the accumulations must go wherever the principal goes. (12 Moore 41, Bissonath Chunder).

The testamentary power, engrafted upon the general Hindu law by the custom of Bengal, which has been recognized and established by repeated decisions, must be taken to exist, subject to those restraints which the general policy of the law enforces, on the exercise of testamentary power in general. It cannot enable a Hindu testator to alter perpetually the legal course of succession to his property, by making it pass for all time to those, who, taking not as legal, but as substituted heirs, would, according to the phraseology of English law, take, not by descent, but by purchase. If the object of the testator is to create for his own property a new course of descent as long as he has any descendants in the strict male line, such as that these males are to inherit in every respect in accordance with the ordinary Hindu law, modified only by the exclusion of the females, such an object is beyond the scope of the testamentary power recognized by law, and cannot but fail. Inequality of shares provided for in a will is independent of the manner in which they are limited to descend, the intention which dictates the disposition of property in unequal shares among the legatees may be quite distinct from the intention which dictates a provision in the will whereby the property is directed to descend in a particular line of heirs. (8 Moore 78, Sonaton Bysack).

If a Hindu bequeathes to his sister's sons generally, some of whom are born before and some after his death, the bequest is void, being made to a class all of whom cannot take (3 C. L. R. 326, Khoodee Money). The word 'putrapautradi' in a will means 'heirs' in general, and not heirs male exclusively. There is nothing repugnant to Hindu law in a will, which provides that after the widow, the daughter's daughter is to get the property, unless she be barren, avira or otherwise disqualified. Such a bequest passes an absolute estate. (4 C. L. R. 77 ; S. C. P. R. 10 C. L. R. 349, Srimati Haridasi). A bequest of surplus to the marriage expenses of poor Brabmins and fellow-castemen and conformably to what the executor may deem suitable is not void for uncertainty, but is a valid bequest. But a bequest to Pundits holding tolls and for the reading of the Mohabharat and Puran and prayer of God, seems to be invalid on the ground of uncertainty. (I. L. R. 4 Cal 443, Dwarkanath). When a female legatee takes under the same provisions with male ones, Hindu law does not prevent her from taking an absolute interest if the males do so (5 C. L. R. 557, Chunder Money). A widow takes no more absolute right over the property bequeathed to her than she would take over such property if conferred upon her by gift during the life time of her husband. In order that she should take a greater interest than a life estate, either by gift or will from her husband, it is necessary that there should be express words in the document giving a heritable right or power of alienation. Although the same expression is used with regard to both males and females in making a gift of property, the general rule of construction is not violated if we suppose that the property given in each case passes to the recipient qualified by the capacity in each case to take under gift or will, and it differs in the case of a wife from that of other takers (5 C. L. R. 561, Kunjobehari.) If the intention is clear that the testator gave away the profits only by his will, and not the corpus, the will must fail, and cannot be construed as a dis-

position of the corpus. Perpetual accumulation of the profits is against the policy of the law. (8 C. L. R. 486, Sukmoy Chunder). A testator bequeathed his whole property to his grandsons, subject to certain annuities, life interests, and directions for accumulations for 5 years. The court held that the disposition was not void on the ground of being in favor of a class, all of whom cannot take, but that the directions for accumulations were void, (10 C. L. R. 216, Kalinath).

A gift by will upon condition that the subject matter should descend to heirs male only, is void. A bequest to nephews and their descendants in the male line, with a condition that, "If any of them die childless, then his share shall devolve upon the survivors of my nephews and their male descendants, and not on their other heirs" was construed in this way, that the testator intended to pass the whole augmented share to the sole surviving nephew, who was entitled to a life-estate therein. (I. L. R. 6 Cal 421, Shosi Shekhar).

ON ENDOWMENTS.

Endowments, under the Hindu law, are properties, moveable or immoveable, set apart for the purposes of some religious or charitable institution, or for some idol. They are either private or public. Instances of public endowments for idols are the temple of Juggernath at Puri, of Visweswar at Benares, and other celebrated idol shrines, the resort of pilgrims from all parts of India. Private idols are often endowed with considerable properties; but in their case, the right to worship is vested in some private family. In the case of public idols, although the right to worship is vested in the general public professing the Hindu religion, yet the right of managing the endowed properties, of regulating the mode and conditions of worship, appropriating the offerings, conducting the indispensable daily worship, and of regulating the hours of access to the shrine, and so forth, is generally in some particular

family. Whether the endowment be private or public, the manager of the temporal and spiritual concerns of the endowment goes under different names in different parts of India. In Bengal, the names are (1) Sebayet, (2) Panda, (3) Mohunt ; in the Northwest, Panda and Mohunt are the ordinary names. In Madras, the name Dhammakatta has some currency. It ought to be mentioned that the Mohunt is the name of the manager of a Muth, or place of residence for religious devotees ; while Sebayet is the trustee or manager of the endowed properties of some private idol ; Panda being a manager of a public idol. Most endowments are connected with some idol or other ; while endowments for distributing alms, or doling out food, or giving food and shelter to travellers and guests are instances of purely charitable endowments. But generally these charitable duties are undertaken by the religious endowments, where the principal purpose of the institution is the worship of some idol.

In all such idol endowments, the fundamental principle of law is, that it is the idol which is to be considered as the owner of the properties, which constitute the temporalities of the shrine, the Panda or the Mohunt is but a trustee charged with their management. As a corollary from this principle follows the proposition that the powers of the manager of an endowment as regards the alienation of the endowed property are restricted. He can alienate them only under certain special circumstances. Alienations other than what the law considers as justifiable are void. Although the manager who in violation of his trust does so alienate, himself keeps aloof from reasserting the right of the endowment, it is open to his successor to question the validity of the alienation. The law upon the subject has been thus laid down. The idol must be considered as the owner of the endowed property and the sebait as the trustee or manager of it for the idol. A sebait is competent to alienate a reasonable portion of the property, if the alienation is required by the necessities of the manage-

ment. One such necessity is the repair of the temple ; another is the restoration of the image of the idol when it has been accidentally destroyed, or defaced or disfigured by time. Such restoration is attended with performance of various religious ceremonies, which often involve large expense. An alienation under such circumstances is justifiable ; for it is not incumbent upon the manager to meet the expenses from his private funds. (15 W. R. 228, Taboomissa). This restriction upon alienation extends to the creation of derivative tenures of a permanent character. Such are the putness, the durputnees and the mourosee mokureree leases. These carry with them rent fixed for all time. To do so would be to deprive the endowment of the benefit of the augmentation of a rent variable from time to time. It would be a breach of duty on the part of the trustee, and therefore not permissible by law. (13 W. R. P. R. 18, Sibessuree Debya).

With regard to Muths, it has been held that the only law as to the Mohunts and their offices, their functions and duties, is to be found in custom and practice, which is to be proved by testimony. (8 W. R. P. R. 26, Giridhari Dass.) Succession to Muths or religious endowments is regulated in each case by the nature of the endowment and the rule of succession which the founder of the institution has prescribed. Where this rule cannot be discovered from the original deed of grant or other documentary evidence, it is to be proved in each case by showing what the usage has been on the occasion of each succession. Muths are of three kinds, mourosee, panchaiti, or hakimi, (for an explanation of which, see ante p.) In a mourosee muth the mere election by other mohunts on the occasion of the Bhandara ceremony gives no title to the person elected. It is doubtful whether a sanyogi, that is, a married person, or one leading an immoral life, is qualified to be a mohunt, unless he has expiated his sins by proper ceremonies, which fact must be proved by positive evidence. (5 C. L. R. 73, Sita prasad). Another rule is that there cannot be two mohunts for

the same Muth, existing at the same time ; the office of the mohunt cannot be held jointly. If there has been a double ticca, or investiture, one must be a ticca of the office in reversion. But no mohuntship can be given in reversion. (8 W. R. P. R. 27, Giridhari Dass.)

ON THE SOURCES OF HINDU LAW.

1. The primary source of Hindu Law is the Veda. Both Manu and Yajnavalkya, when naming what they call the root of law, mention Veda the first of all.

2. The word for Law in Sanscrit is dharma, although Hindus are accustomed to associate religion, with it. That is one of the meanings in which the word is used ; but in works on Hindu Law in the original, in most cases the word dharma stands for law. The ancient works on Hindu Law, the Institutes of Manu, Yajnavalkya, Gautama, Vasishtha and others, are called dharma sastras ; the word 'dharma sastra' would literally mean 'written ordinations or injunctions on the subject of law'.

3. Yajnavalkya, at the beginning of his work, enumerates some twenty authors of dharma sastras, or treatises of law. Works in Sanscrit are still extant bearing the names of these authors ; these works are called 'Sanhitás'. The word Sanhitá literally means a compilation. Thus the work ascribed to Manu is Manu Sanhita ; that ascribed to Vasistha is called Vasistha Sanhitá. Another method of naming these treatises is to call them Manu smriti or Vasishtha Smriti, and so on. Now when these works are examined, they are found to contain a good deal of matter which we would be scarcely disposed to deem as part of the law of the land. Thus regulations relating to cleanliness, ablutions, saluting a guest ; regulations regarding the kinds of food to be eaten, or not to be eaten, and so forth ;—constitute a good portion of the subject matter dwelt upon in those treatises. Some of those treatises are ex-

clusively concerned with matters of the above character, which we in these days are seldom accustomed to consider as forming an integral portion of the municipal law, But the most important of these treatises, such as those of Manu and Yajñavalkya, Gautama, Vasistha and Vishnu have dwelt upon, along with matter of the above character, subjects which properly fall within the domain of law.

4. This blending of what is law properly so called with what is not law in the strict sense of the term, is not a matter of surprise, remembering how Austin has analysed the conception of a law. A law according to him is a command addressed by a superior to his inferior, which has some punishment for its sanction. This superiority and inferiority have regard to the difference of power possessed by different beings. Thus one being has such power that he can inflict pain or evil upon another if he chooses ; then the former is called superior to the latter. The superior being addresses to the inferior being a certain command to do or not to do a particular thing, at the same time telling him that if he does not do the thing or forbear from doing the thing, the superior will visit the inferior with some pain or evil, otherwise called a punishment or sanction. In such a case all the elements of a law are nearly-complete, but not altogether complete. The conception of law implies that a number or class of acts must be commanded to be done or forborne from.

5. I have recalled this analysis of a law by Austin, in order to show that the authors of our ancient Dharmaśāstras were guided by a similar notion of a law or Dharma, in blending together in their works such incongruous matters as the washing of one's body and the partition of inherited property. I may even say, that there is direct authority for concluding that the ancient Sanscrit writers had sufficiently advanced in the field of speculation to have expressly formulated in words Austin's analysis of law. For Jaimini, the celebrated founder of the Mīmāṃsā system of philosophy, the

sole aim of which philosophy was to lay down principles of interpreting the sacred writings of the Hindus, sets out by saying that, Dharma or law has a command or order or direction for its characteristic mark.

6. If therefore a law or Dharma be a kind of command, we must then remember that the Hindus considered themselves as bound to follow all the different kinds of commands promulgated to them, whether these commands are contained in the Vēdas or the Smritis. or the Purānas ; and whether these commands relate to rules of purification, or impurities, or partition of inheritance. The sanction for these different kinds of commands is the same in the eye of an orthodox Hindu ; at least it is the same under the theory propounded by the Brāhmanic promulgators. The sanction is the punishment in the next world which awaits all who contravene the rules laid down in the Dharmasastras. It was thus that the rules relating to cleanliness and purifications, and religious observances and sacred rites, all got blended together in our body of law. To put the same idea in a form more suited to the European notions, the whole body of our law is regarded as divine law ; and that civil or municipal law, as contradistinguished from ritual or sacred law, is but a branch, according to Hindu ideas, of that comprehensive divine law.

7. Under this view of the matter, divine law is divided into three separate branches ; the first branch is known by the name of Achāra ; the second branch is called the Vyavahāra ; and the third is called the Prāyaschitta. An idea may be formed of the Achāra portion of the law, if we remember how the life of every orthodox Hindu is controled by minute directions as to matters like the following ; at what hour must an orthodox Hindu rise from bed ; what distance must he go every day from the precincts of his house in order to satisfy calls of nature ; what rules of cleanliness and what methods of washing his body he must follow every day ; how is he to pray ; what food must he eat ; these and innumerable other

questions of a similar kind find an answer in the Achára portion of the Hindu law.

In the Práyaschitta division of the law, the diverse kinds of sins, how they are incurred, and what a man must do in order to set himself free from the taint of those sins, are dwelt upon at great length. But it is the Vyavahára portion which constitutes the civil law, the law relating to rights and obligations and liabilities. This is the branch of the Hindu law which has in these days monopolized the name of Hindu law as administered by the tribunals; this branch therefore is the only portion useful for the practical purposes of life.

8. Both Manu and Yajnavalkya have said that our knowledge of law is to be derived, in the first place, from the Veda, in the next place, from the smriti, in the third place from the practices or usages observed or followed by persons whose life and general conduct are deserving of approbation, and lastly from the dictates of our own cultured conscience. •

9. In modern days, so far as the civil law is concerned, we have rarely to appeal to the Veda itself. In that vast body of ancient Sanscrit literature which goes under the name of the Veda, we do not meet with any saying or any proposition which would help us when we require to decide a disputed point of law. There may be a passage here and there which with difficulty may be construed into an authority for a current proposition of law generally accepted. But the authority found in the Veda is of so vague and indefinite a character, that no practical purpose would be served by citing the passage from the Veda itself; the proposition of law involved or shadowed forth in the passage from the Veda must be sought in the later treatises, in order to be properly understood and applied in practice. For the sake of illustration, it is generally said in the later treatises that the Veda is against the heritable rights of women. A passage is also quoted as forming a part of the Veda, the meaning of which passage is that women have no heritable rights. But this passage hardly gives us any light

as to the modern law relating to the heritable rights of women. We know that a widow succeeds to her husband's property under certain contingencies ; that a daughter in some cases inherits her father's wealth ; that both the mother and the grandmother become heirs ; and that in Bombay even a sister gets her brother's wealth. The Bombay law has further accorded heritable rights to many other female relations, as for instance a daughter-in-law, or an uncle's wife, all those female relations in fact, who may come under the appellation of gotraja sapindas. The passage from the Veda therefore which is cited in our later treatises as denying heritable rights to women has become obsolete in Bombay. But the passage is put to some use in Bengal and the Benares schools. In these two schools of law, the general spirit is opposed to the introduction of fresh female relations into the line of heirs ; these two schools maintain that the heritable rights of females depend upon express and exceptional texts ; that ordinarily females are excluded, according to the passage from the Veda ; that it is when some authoritative work on law expressly mentions particular female relatives as entitled to succeed to the property left by some deceased relative, that the heritable rights are recognized by law. The particular female relations mentioned by name as entitled to succeed are the widow, the mother, the daughter and the grandmother ; these have been so mentioned by Manu. The Bengal and the Benares schools therefore have allowed heritable rights to those four female relatives. But if any attempt is made to extend heirship to any other female relation, such as a son's widow for instance, those two schools would appeal to the passage of the Veda, to negative the right so contended for. This is the reason why the Veda must still be enumerated as one of the living and current sources of Hindu civil law.

10. I ought to mention here that the expression civil law, has a restricted sense, in that it stands as contradistinguished from what is called the canon law, or the religious law of Europe. A European lawyer would understand by that phrase

the body of rules derived from the system of Roman Jurisprudence which are applicable to civil rights and liabilities. In this way, no doubt, the phrase might be unsuitable as designating that portion of the whole body of Hindu law which relates to civil disputes, or to contentions between man and man as regards their civil rights, liabilities and obligations. But since such phrases as 'civil courts' and 'civil rights' have become current in the body of the Indian law, the expression 'civil law' may be employed to designate those rules that relate to civil rights and obligations.

11. The source of by far the greater portion of Hindu civil law, or less ambiguously, the Hindu law having reference to dispute about civil rights and civil liabilities, are the Smritis.

Like the Veda, the Smritis form a vast body of legal literature, written in Sanscrit. Some of these works are of a very ancient date; while others bear conspicuous marks of having been composed within but a few hundred years from the present day. The word 'smriti' signifying 'remembrance' or 'recollection', involves a particular theory as to the origin of this body of legal literature. The theory is that the primary or original source of all Bráhmánic law is the Veda; but in course of time, a goodly part of the Veda became lost to the world; that then arose a number of men endowed with super-human intellectual powers; the memories of these renowned saints or sages, known by the name of Munis or Rishis, were so vast that they retained the whole of the matter contained in the Veda; or it may be that these intellectual giants evolved from their illumined inner consciousness all the rules of law or dharma that were ever embodied in the Veda. Now the smritis are the works composed by them, or lectures given by them to their pupils, or explanations orally propounded by them to other Rishis or Munis who wanted to enlighten themselves as to the rules of law, both human and divine. Thus arose the works on law generally known as Smritis or recollections,—recollections that is to say, of the contents of

the lost Veda, and recorded in the form of written treatises. They are also called the Dharmasástras, or the Sanhitas. Thus the Smṛiti or Dharmasástra treatise said to have been written by Gautama is called the Sanhitá of Gautama, or the Gautama—Sanhita ; i. e. the Institutes of Gautama. Similarly the Sanscrit treatises on Hindu Law written by Manu &c. are severally called the Institutes of Manu, of Yājñavalkya, and Vasistha, and so on. When a Sanscrit treatise on Hindu Law is called a Sanhitá, or the Institutes of so and so, we are to understand that the author is some Muni or Rishi, or some personage whose sayings are *per se* authorities on questions of Hindu Law. The names of the authors of these Sanhitás are found collected at different places, and some of the lists contain as many as 96 names. The principal authors of the Sanhitás whose sayings are frequently referred to in connection with the Hindu civil law are as follows :—First and foremost is Manu ; then Atri ; then come the following names as enumerated in the beginning of Yājñavalkya's Institutes of Hindu Law viz. Vishnu, Háríta, Yājñavalkya, Usana, Yama, Apastamba, Kátyáyana, Vrihaspati, Parásara, Vyása, Sankha, Likhita, Gautama, Vasistha. There are others not mentioned by Yājñavalkya, who are as follows :—Baudháyana ; Nárada, Paithinasi, Márkandeya, Saunaka, Vrihanmanu, Vṛiddhamanu, Laghu—Háríta.

In this list are contained the names of the principal Rishi authorities, whose sayings are quoted in connection with questions of Hindu Law which are of any practical importance. If a person wished to obtain a clear view of the different sources of Hindu Law, it is better that he should commit all these names to memory.

12. For it often happens that persons unfamiliar with the subject, not seldom confound one kind of authority, with another. All the Sanscrit authorities on Hindu Law are not equally authoritative ; some stand as superior to others ; which means that if the superior authority has laid down the law in one way, and the inferior authority has laid it down in a con-

trary way, the law as laid down by the superior authority will prevail, and will be accepted in preference to the law as laid down by the inferior authority. In order, therefore, to obtain correct notions on Hindu Law, the different classes of authorities must be distinguished from one another. Now the classes of written authorities on Hindu Law may be thus named in the order of their superiority. First the Veda; then the Smritis or the Dharmasastras or the Sanhitás passing under the names of Rishis or Munis, the principal of whom I have mentioned in the above list; then come the Nibandha treatises, whose nature I shall presently describe. These three classes complete the written sanscrit authorities on Hindu Law.

13. The works composed by Rishis, or the Sanhitás or the Institutes properly so called, are binding authorities in every part of India; it is not open to any Hindu, wheresoever he may be domiciled, whether in Bengal, in the Northwest, in Madras, in Bombay, or in the Mithila, otherwise called the district of Tirhoot, to say that he is not bound to follow the law as laid down by Manu, or Yájnavalkya, or Vasistha or Gautama or any other of the Rishi authors I have named above. A Hindu may dispute as to the correct interpretation to be put upon any particular saying of this or that Rishi; he may say that the meaning of the text is different from what is found in a particular commentary of the text. But he cannot say that the text is not the law he is obliged to follow. So long as he remains a Hindu, the texts of these Rishis must furnish the law for guiding his conduct.

14. Manu again is supposed to be superior to all other Rishis as an authority on Hindu Law. Manu was not exactly a Rishi himself. He was in one sense a king; in another sense he was the progenitor of mankind, himself almost a superhuman being endowed with qualities far transcending ordinary human attributes. Whatever is found in the Book called the Institutes of Manu is accepted as the very highest authority on questions of Hindu Law, all over India. European

to what the Hindu Law says upon the subject : although the Legislature does not say that the law of vendor and purchaser must be the Hindu Law, The Courts in doing so are led by principles of justice, equity and good conscience. They say that it is conformable to equity to decide cases according to the usages prevailing among a section of the community to which the parties to the suit belong. They say that suits between Hindoos should be decided according to Hindu usages, provided these usages be not patently unjust, or abrogated by legislature. But the authoritative treatises of Hindus Law, such as *Manu* and the rest, furnish the best evidence as to what the usages among Hindus have been with reference to a particular matter from time immemorial. The Courts therefore refer to Hindu Law in order to decide the question whether delivery of possession is indispensable or not in order to pass a complete title by sale of immoveable property.

Thus we see that it would be difficult to say which portion of the Rishi authorities may not come to some practical use on certain occasions that may arise in the course of administering Hindu Law. But the most important portion of these Sanscrit authorities no doubt are such as expressly deal with either inheritance, or succession, or marriage, or caste, or religious usages and institutions.

18. It ought to be noticed here, that the Legislature has named two separate classes of cases, under the heads of inheritance and succession. Now what is the difference between inheritance and succession ? I apprehend inheritance means succession by a natural heir, while succession includes cases in which persons other than natural heirs succeed to property. Thus it is unquestionable that the subject of adoption among Hindus is governed by Hindu Law. Yet the legislature has not expressly named adoption as amenable to Hindu Law. It may no doubt be said that an adopted son inherits the property of his adoptive father ; his case therefore falls under the head of inheritance. But whether it does so

fall or not, there cannot be any doubt that it falls under the head of succession ; for whether an adopted son can be said or not to inherit the property of his adoptive father, he succeeds to such property. Again, there are certain rights such as a right to worship a Thacoor ; a person may be said to succeed to such a right. Again, wherever property is obtained by virtue of a will it is a case of testamentary succession. All these questions among Hindoos are necessarily governed by Hindu Law ; and I believe the Legislature has so provided by separating the two heads of inheritance and succession.

19. Upon all these questions, the authority of Manu is paramount. One of the Rishi authorities, namely Vrihaspati, has expressly declared that if there be a conflict between Manu and any other of the Rishi authorities, the law as laid down by Manu will prevail, and the conflicting proposition of law found in the other Rishi authority will be rejected. Excepting Manu, all the Rishi authorities are equal in rank. If there be a conflict between any two of them, the proper course would be to try to reconcile them, by finding out some principle of limiting the application, or by putting some interpretation upon one text that may bring it into harmony with the other. By way of illustrating the method of bringing about a harmony between two conflicting texts, I may mention the case of widow's right under the Benares school. Some Rishis say that it is the brothers who inherit a deceased person's property ; others say that it is the widow who does. Vijnánesvara, the leading authority of the Benares school, has brought about a harmony between these two seemingly conflicting sets of Rishi texts. The mode of reconciliation proposed by him is that the widow will get the property of her divided husband, but the brothers will get when the husband died in an undivided condition. This mode of reconciliation would be called by a Bráhmaṇ Pundit lawyer as that of Vishaya-vibhaga, or the method of separating the application. This method of reconciling conflict of texts is one of universal application ; and any other method, such as

that of rejecting one text, and adopting the other opposed to it, is not admissible ; for that would be to establish superiority and inferiority between two Rishi authorities who rank as equal. Such a superiority attaches to Manu alone.

20. Sometimes however, attempts are made to set up a particular authority for a particular cyclical age. Thus it has been laid down in the Institutes of Parásara, that Manu's work is suited to the satya-yuga, or the first cyclical age ; that the Institutes of Gautama are a special authority for the second cyclical age, or the Treta ; that the joint production of the two Rishis, Sankha and Likhita, is fit for the third cyclical age, or the Dvápára ; while the fourth cyclical age or the Kali has for its special treatise on law the Institutes of Parásara. But we are not to suppose that in this Kali age, the Hindus are precluded from consulting the three special treatises for the past three ages, in order to ascertain a disputed point of law. Were it so, we should be at a fix ; for Parásara has written scarcely two lines on the subject of Hindu civil law ; the whole of his work being concerned with the áchára and the práyascitta branches of the law ; in other words, Parásara has written a work on Hindu Religion ; and no light is derivable from his book on the subject of civil rights. Probably the meaning of the text of Parásara which assigns a particular treatise for each cyclical age is that in case of a conflict, it is the particular treatise which will be followed in preference to the works of other Rishis. A notable instance of this preference occurs in connection with the subject of adoption. Most of the Rishis, and Manu also, have enumerated twelve kinds of substitute sons ; but Parásara as understood by later writers, enumerates three kinds of sons ; therefore, in the present age of Kali, only three kinds of sons are recognized by law, namely, the aurasa son, or the son born in lawful wedlock ; the dattaka son, or the son obtained by gift ; and the krítrima son, or the son made. This latter kind of son is recognized only in the Mithila country, which is comprised in the modern district of Tirhoot or Mozufferpore.

21. I now come upon the Nibandha treatises. These are works on Hindu Law composed by learned Hindu lawyers in Sanscrit prose ; the method which these authors have followed has been to take up a particular subject, such as that of Gift, or Litigation in general, or some branch of ritual law, and to treat the subject by collecting together a number of Rishi texts connected with that subject. These authors of the Nibandha works set forth their own views of the law in the course of explaining the Rishi texts. The most important of these Nibandha works are the Dáyabhāga of Jímútavāhara, the Víramítrodaya of Mitra Misra, the Vivádachintāmani of Váchspati Misra, the Smritichandriká of Devagana Bhatta, the Vyavahāra—mayukha of Nila-kantha, the Madanapárijáta of Visvesvara bhatta, the Dáya-krama Sangraha of Srikrishna, the Tatva works of Raghunandana, and the Vivádabhangarava of Jagannátha.

I have not named the Mitákshará as a Nibandha treatise, because in form it professes to be a running commentary upon the Institutes of Yājñavalkya, though in substance, it may be said to be a Nibandha treatise of the very highest class. It is an authority throughout India, excepting Bengal ; even in Bengal, its views are acceptable when not in conflict with the Dáyabhāga. It is the model of a clear exposition of law ; it has gathered, in course of explaining Yājñavalkya's words, a large number of valuable Rishi texts, and has given an explanation of these texts too. The Mitakshará therefore may be viewed either as a commentary or as a Nibandha work. But whatever name may be given to it,—as a work on Hindu law, its paramount authority is everywhere acknowledged.

22. Side by side with the Nibandha works, must be mentioned the commentaries, some of which have attained an authoritative character of the highest kind. Thus the two commentaries on the text of Manu, one by Kulluka-Bhatta and the other by Medhá tithi, are everywhere consulted as unexceptionable expositions of the purport of Manu. Then there is the commentary of Nandapandita, named Vaijayanti, on the

Institutes of Vishnu. And the commentary called *Subodhini*, by *Visvesvara Bhatta*, on the *Mitakshara*; the great commentary by *Madhavacharya* on the *Institutes of Parasara*; the commentary by *Srikrishna* on the *Dáyabhága* of *Jimuta—váhana*.

23. It must not be supposed that the above is an exhaustive list of Sanscrit works on Hindu Law. But these are the works which are generally deemed authoritative on Hindu Law. The opinions and views promulgated in these works will be adopted by our administrators of justice, although the consonance of these opinions and views with the texts of the earlier Rishis may not be so obvious. Now these opinions and views are not all alike; the *Mitákshara*, for instance, differs radically from the *Dáyabhága*. A question therefore arises, How is a disputed point of law to be determined, in case of a difference between two *nibandha* works, where no text of the earlier Rishis is forthcoming to settle the matter? To answer this question, we must explain, what is meant by a school of Hindu Law.

24. Hindu law is said to be divisible into five schools. Each school is characterised by certain peculiarities in its law. These five schools of Hindu Law are those of (1) Benares, (2) the Mithila, (3) the Bengal, otherwise called the *Gauriya*, (4) the Madras, otherwise called the *Drávira* school, and (5) the Bombay, otherwise called the *Maháráshtra* school. In order to give a clear idea of what a school of Hindu Law is, I may here bring forward an example or two of the peculiarity of the law followed by each. Thus in Bombay, a sister is in some cases allowed to be an heir to her brother. In no other part of India is a sister so allowed. The heirship of the sister is therefore a peculiarity of the Bombay or *Maháráshtra* school of Hindu Law. Again, in Bengal, a son is held to have no right to the ancestral property so long as his father is alive; while throughout the rest of India, the son is held to be a coproprieter with his father in all ancestral property. The denial of son's right therefore during his father's life is a peculiarity

of the Bengal or Gauriya school of Hindu Law. Again, adoption in the Kritrima form is a peculiarity of the Mithilá school of Hindu Law.

25. The mutual differences between the five schools of Hindu Law have now assumed a tangible shape, by a particular treatise having been assigned to each school, since the period when Hindu Law came to be administered by British judges, after the establishment of the sovereignty of England over India. These British judges were up to a recent date assisted by Pundits, acquainted with the authorities in Sanscrit. The method pursued was that the Pundits were furnished with the facts of each particular case involving a question of Hindu law, when the British judges had any such case to decide. The Pundits stated what the law was as applicable to the facts of the case, citing authorities for the propositions advanced by them. Now the Pundits of the different provinces of India were found to refer to different nibandha treatises as the sources from which they drew their propositions of law; and the treatises found to be most frequently cited by the Pundits of each Province were assigned by the British administrators of justice as the special authorities of Hindu Law for that particular Province. The following is a summary of the treatises assigned by the above process to each school.

I. For the Bengal school the principal authorities are Jímútaváhana's Dáyabhága; Ragnunandana's Dáyatatwa; Srikrishna's Dáyakramasangraha.

II. For the Mithilá school.—The Vivádachintámani of Vachaspati Misra; the Vivádachandra of Lakshmi Devi; the Vivádaratnákara of Chandesvara.

III. For the Benares school The Mitákshará of Vijnánesvara; the Viramitrodaya of Mitra-Misra; the Madanapárijáta of Visvesvara Bhatta.

For the Madras school.—The Smritichandriká of Devagana Bhatta; the Mádhavíya of Mádhavácharya; and the Sarasvativilása of Pratápa-rudra. For the Bombay or the Maháráshtra

school;—The Vyavahāra-mayūkha of Nilakantha; and the Kaustabha treatises. The Mitāksharā, however, may be taken to be the paramount authority in all the schools except that of Bengal. Even in Bengal, respect is paid to what is laid down in the Mitāksharā, if the law so laid down does not conflict with the Dáyabhāga. [The Collector of Madura *v.* Cavali Venkata Narayan Appa, 10 W. R. P. R. 21; Bhagwan Din Dobe, 9 W R P. R. 27.]

26. How the different schools of Hindu Law arose, it is now difficult to explain. The Judicial Committee in one case have explained it by the fact that commentaries were written on the texts of the earlier Rishis; these commentaries again became the subject of comments by later erudite men. The views promulgated in all these diverse expositions of law were not adopted universally all over India, but were limited to particular localities. [Collector of Madura *v.* Cavali Venkata Narain Appa, 10 W. R. P. C. 21.] In another place, the Judicial committee have said that the foundation of the doctrine of different schools is a particular text of Manu. [ch. 8, Sloka 41.] In this text, a king is directed to pay due regard to the customs and usages prevailing in particular districts. The difference in the local customs of the different parts of India was the origin whence the schools of Hindu law took their rise by the process of the Brahmin propounders of law trying to explain the Rishi text in accordance with the local usages. [Ruchpati Dutt Jha *v.* Rájendra Náráyan Ray, 2 Moore I. A. 160.]

Difference of local usage being thus the primary cause of the division of Hindu Law into different schools, it may be a matter of wonder that there are only five schools as specified above. India is a vast country; the variety of local customs prevailing in different parts of it are expected to be many; it is not likely that these variations should be only five. But the reason why modern courts for administering Hindu Law recognize only five, is that these have risen to sufficient prominence to be

worthy of recognition. The cause of their rising into prominence is that each of these five schools can boast of meritorious treatises in which the subject of the particular local law has been worthily dealt with. But if the differences of all the original treatises on Hindu Law were taken into account, I believe the existence of other schools confined to small areas might be established. But somehow these small differences have merged into the five large schools. And Courts will not now easily recognize them. In the original treatises, we see mention of the eastern, the northern and the southern schools. Sanscrit writers do not exactly call them schools, but mention them as the eastern lawyers or the northern lawyers ; or the southern lawyers ; the terms used by them being the *Práchyas*, the *Udichyas* and the *Dákshinátyas*.

APPENDIX I.

TABLE OF SAPINDAS SHOWING THE AMOUNT OF SPIRITUAL
BENEFIT CONFERRED BY EACH.

N.B.—Pindas or cakes may be characterised as of three kinds. When A gives pinda directly to B, as a son to his father, grandson to his grandfather, &c., there the pinda may be said to be a direct one; when A only shares with another ancestor pindas given by a third to that ancestor, there the pindas may be said to be shared by A; for example, A shares pindas given by his brother to his father.

Pindas are called **secondary**, when they are given to the maternal ancestors of the giver.

IMMEDIATE SAPINDAS.

1. Son gives 1 pinda direct, and 2 shared.
2. Grandson 1 " " 1 "
3. Great-grandson 1 " " none "
4. Daughter's son 1 direct, but secondary, and 2 shared but secondary.
5. Son's daughter's son, 1 direct secondary, 1 shared secondary.
6. Grandson's daughter's son 1 ditto. none ditto.

SAPINDAS ON THE FATHER'S SIDE.

- | | | | | | | |
|-----|---|-----|-------|---------|--------|------------------|
| 1. | Father | ... | none | direct, | 2 | shared. |
| 2. | Brother | | ... | ditto | 3 | ditto. |
| 3. | Brother's son | | ... | ditto | 2 | ditto. |
| 4. | Brother's son's son | | ... | ditto | 1 | ditto. |
| 5. | Father's daughter's son | | ... | ditto | 3 | ditto secondary. |
| 6. | Brother's daughter's son | | ... | ditto | 2 | ditto ditto. |
| 7. | Brother's son's daughter's son | | ... | ditto | 1 | ditto ditto. |
| 8. | Grandfather | | ... | ditto | 1 | ditto. |
| 9. | Father's brother | | ... | ditto | 2 | ditto. |
| 10. | Father's brother's son | | ... | ditto | 2 | ditto. |
| 11. | Father's brother's son's son | | ... | ditto | 1 | ditto. |
| 12. | Grandfather's daughter's son | | ... | ditto | 2 | ditto secondary. |
| 13. | Father's brother's daughter's son | | ditto | 2 | ditto | ditto. |
| 14. | Father's brother's son's daughter's son | | ... | ditto | 1 | ditto ditto. |
| 15. | Great-grandfather | ... | ... | ditto | none | shared. |
| 16. | Grandfather's brother | | ... | ditto | 1 | shared. |
| 17. | Grandfather's brother's son | | ... | ditto | 1 | ditto. |
| 18. | Grandfather's brother's son's son | | ditto | 1 | ditto. | |

19. Great-grandfather's daughter's
son ... none direct, 1 shared secondary.
20. Grandfather's brother's daughter's
son ... ditto 1 ditto ditto.
21. Grandfather's brother's son's
daughter's son ... ditto 1 ditto ditto.

As regards sapindas on the mother's side, none of the pindas given by them are shared by the last owner ; in their case, the consideration is, how many pindas given by them are such as the deceased would have given, on his own part. Therefore, against the name of each sapinda, we place a figure to indicate the number of persons who are the common recipients from that particular sapinda and the deceased.

SAPINDAS ON THE MOTHER'S SIDE.

1. Mother's father ... 2 pindas that deceased
would give.
2. Mother's brother ... 3
3. Mother's brother's son ... 2
4. Mother's brother's son's son ... 1
5. Mother's sister's son ... 3 secondary.
6. Maternal uncle's daughter's son ... 2 ditto.
7. Maternal uncle's son's daughter's
son ... 1 ditto.
8. Mother's grandfather ... 1 pinda given by the
deceased.
9. Mother's father's brother ... 2
10. Mother's father's brother's son ... 2 given by the de-
ceased.
11. Mother's father's brother's son's
son ... 1 ditto.
12. Mother's grandfather's daugh-
ter's son ... 2 secondary.
13. Mother's father's brother's daugh-
ter's son ... 2 ditto.
14. Mother's father's brother's son's
daughter's son ... 1 ditto.
15. Mother's great-grandfather ... None ; but receives
a pinda and is there-
fore a sapinda.
16. Mother's grandfather's brother gives 1 pinda given by the
deceased.
17. Mother's grandfather's brother's son 1
18. Mother's grandfather's brother's
son's son ... 1

19. Mother's great-grandfather's
daughter's son ... 1 secondary.
20. Mother's grandfather's brother's
daughter's son ... 1 ditto.
21. Mother's grandfather's son's
daughter's son ... 1 ditto.

The definition of a sapinda may be stated in three separate propositions.

- I. A is sapinda to B, if A gives pinda to B.
 II. A is sapinda to B, if A receives pinda from B.
 III. A is sapinda to B, if both give pinda to a common ancestor C.

All the immediate sapindas become so, in accordance with the Proposition I.

Nos. 1, 8 and 15 out of the sapindas on both the father's side, and the mother's side, become so, in accordance with the Proposition II.

All the rest of the sapindas on both the father's and the mother's side, acquire that relationship, by virtue of the Proposition III.

APPENDIX II.

TABLE OF SUCCESSION AS IT MAY BE DRAWN UP FROM THE EXPRESS WORDS OF THE DAYABHAGA, WITH REFERENCE TO THE PROPERTY LEFT BY A HOUSE-HOLDER.

I. Sapindas	...	Dáyabhága Ch. XI. S. vi. Para.	19
II. Sakulyas	...	" " " "	21
III. Samanodakas	...	" " " "	23
IV. Spiritual Preceptor	...	" " " "	24
V. Disciple	...	" " " "	24
VI. Fellow-Student	...	" " " "	...
VII. Persons of the same gotra dwelling in the same village	...	" " " "	25 & 26
VIII. Persons of the same právra dwelling in the same village	...	" " " "	25 & 27

- IX. Brahmans of the
 same village ... Dáyabhága Ch. XI. S. vi. Para. 26 & 27
- X. The King, except
 with regard to
 the wealth of a
 Brahman ... " " " " 26 & 34

Succession of the Classes I. or of Sapindas.

- | | | | | | |
|-----|---|----|--|--|--|
| 1. | Son, and grandson whose father is dead, and great-grand-
son whose father and grandfather are dead. Dáyabhága Ch. XI. S. i., Para. 34 ; S. vi. Para. 29. | | | | |
| 2. | Grandson ... Dáyabhága Ch. XI. S. i., Para. | 43 | | | |
| 3. | Great-grandson ... " " " " | 43 | | | |
| 4. | Widow ... " " " " | 43 | | | |
| 5. | Maiden daughter ... " S. ii. " | 4 | | | |
| 6. | Married daughter, who
has, or is likely to
have a son ... " " " " | 8 | | | |
| 7. | Daughter's son ... " " " " | 25 | | | |
| 8. | Father ... " S. iii. " | 1 | | | |
| 9. | Mother ... " S. iv. " | 1 | | | |
| 10. | Re-united whole bro-
ther ... " S. v. " | 36 | | | |
| 11. | Un - re - united whole
brother and re-united
half brother together ... " S. vi. " | 36 | | | |
| 12. | Re-united half brother ... " " " | 36 | | | |
| 13. | Un-re-united half-bro-
ther ... " " " | 36 | | | |
| 14. | Re-united whole bro-
ther's son ... " " " " | 2 | | | |
| | and S. v. Para. 39. | | | | |
| 15. | Un - re - united whole
brother's son and re-
united half-brother's
son together ... " S. v. " | 39 | | | |
| 16. | Re - united half - bro-
ther's son ... " " " | 39 | | | |
| 17. | Un-re-united half-bro-
ther's son ... " S. vi. " | 2 | | | |
| 18. | Brother's son's son ... " " " | 6 | | | |
| 19. | Father's daughter's son ... " " " | 7 | | | |

As far as father's daughter's son, the Dáyabhága has expressly specified, who is to succeed first, and who next after him.

After the father's daughter's son, the succession is indicated in general terms. Thus :—

- A. The descendants of the paternal grandfather, including the daughter's son, in the proximity by way of pinda. *Dáyabhága* Ch. XI. S. vi. para 9.
- B. The descendants of the great-grandfather, including the daughter's son, in the same order. *Dáyabhága* Ch. XI. S. vi. para 9,
- C. Maternal uncle &c., who are the givers of pinda given by the deceased, paras. 12, 14 & 20.

Succession of the Class II or the Sakulyas.

1. The three descendants of the deceased, from the grandson of the grandson of the deceased. *Dáyabhága* Ch. XI. S. vi. Para. 21 & 22.
2. The descendants of the three ancestors from the great great-grandfather upwards, who offer pindas to the eaters of lepa given by the deceased. *Dáyabhága* Ch. XI. S. i. para. 38 and S. vi. para. 22.

This is all the *Dáyabhága* states as to the succession of Sakulyas among themselves.

As to the succession of the Class III. or the Samanodakas, the *Dáyabhága* lays down no other rule except that they succeed after the Sakulyas.

APPENDIX III.

TABLE OF SUCCESSION ACCORDING TO THE SRIKRISHNA'S COMMENTARY ON THE DAYABHAGA.

1. Son. 2. Son's son. 3. The son of a son's son. A son's son whose father is dead and the son of a son's son whose father and grandfather are dead, have equal right with the son,
4. Widow. 5. Maiden daughter. 6. Married daughter having, or likely to have a son.
7. Daughter's son.
8. Father.
9. Mother.
10. Whole-brother.
11. Half-brother.

N.B.—If the deceased was re-united only with his whole-brothers, then,

- a. Re-united whole-brother.

- b. Un-re-united whole-brother.

If he was re-united with his half-brothers only, then,

- a. Re-united half-brother.
- b. Un-re-united half-brother.

If the whole brother be un-re-united, and half-brother be re-united, then they are equally entitled.

- 12. Whole brother's son.

- 13. Half-brother's son.

In case of re-union with whole brother's sons only,

- a. Re-united whole brother's son.
- b. Un-re-united whole brother's son.

In case of re-union with half-brother's sons only

- a. Re-united half-brother's son.
- b. Un-re-united half-brother's son.

If the whole brother's son be un-re-united, and the half-brother's son be re-united, then they are equally entitled, like brothers.

- 14. Brother's son's son.

In his case also, the order of succession in accordance with whole or half blood, and re-union and its absence, must be understood.

- 15. Father's daughter's son, whether a whole sister's or a half-sister's son.

- 16. Paternal grandfather.

- 17. Paternal grandmother.

- 18. Father's whole brother.

- 19. Father's half-brother.

- 20. Father's whole brother's son.

- 21. Father's half-brother's son.

- 22. Father's whole brother's son's son.

- 23. Father's half-brother's son's son.

- 24. Father's whole sister's son.

- 25. Father's half-sister's son.

A similar rule is to be observed also in the case of the paternal great-grandfather's daughter's son, who has been afterwards mentioned.

- 26. Paternal great-grandfather.

- 27. Paternal great-grandmother.

- 28. Paternal grandfather's whole brother.

- 29. Paternal grandfather's half-brother.

- 30. Son of no. 29.

- 31. Son of no. 30.

- 32. Son's son to no. 29.

- 33. Son's son to no 30

- 34. Daughter's son to paternal great-grandfather.

35. Maternal grandfather.
36. Maternal uncle.
37. Maternal uncle's son.
38. Maternal uncle's son's son.
39. Grandson of a grandson in the male line.
40. Great-grandson of a grandson in the male line.
41. Great-grandson of a great-grandson in the male line.
42. Great-grandfather's father and his two immediate ancestors and their descendants in the order of proximity.
43. Samanodakas.
44. Spiritual preceptor.
45. Disciple.
46. Fellow-student.
47. A person of the same village, who belongs to the same gotra with the deceased.
48. A person of the same village, who is of the same právara with the deceased.
49. The king, excepting the wealth of a Brahman, which latter should be taken by Brahmans, who possess the qualification of being versed in the three Vedas and similar other qualifications.

APPENDIX IV.

TABLE OF SUCCESSION ACCORDING TO THE DAYATATTWA OF RAGHUNANDANA.

1. Son. 2. Grandson. 3. Great-grandson. A grandson whose father is dead, and a great-grandson whose father and grandfather are dead, receive with the son the share of the wealth which would have been received by their father and grandfather respectively.
4. Widow. 5. Maiden daughter. 6. Married daughter. Raghunandana does not state the distinction on the ground of the married daughters being likely or not likely to have a son, or having or not having a son.
7. Daughter's son.
8. Father.
9. Mother.
10. Brothers.

Among brothers, the whole-brother takes first; then the half-brother. In cases of re-union, re-united half-brother has equal right with the un-re-united whole-brother. But a re-united whole-brother excludes a re-united half-brother.

These rules grounded on re-union and its absence, and on whole-blood and half-blood, apply also in the case of brother's sons when they succeed, and also of paternal uncles when they do so.

11. Whole-brother's son.
12. Half-brother's son.
13. Persons born in the family, called in Sanscrit the gotrajas, who become entitled, in accordance with their superior or inferior claims grounded on their offering of pindas, and also grounded on their proximity of birth. Among these gotrajas, Raghunandana includes, on failure of the brother's sons of the deceased, the descendants of the father, down to his daughter's son; on their failure, the paternal grandfather; on his failure, the paternal grandmother; then the descendants of the paternal grandfather, down to his daughter's son; then the paternal great-grandfather; then the paternal great-grand-mother; then their descendants; then the maternal grandfather; then the maternal uncle; then the three descendants of the deceased, who are Sakulyas, namely grandson's grandson, &c.; then the descendants of the great-grandfather's father, &c.

APPENDIX V.

ORDER OF SUCCESSION ACCORDING TO THE DAYAKRAMASANGRAHA OF SRIKRISHNA.

1. Son. 2. Grandson. 3. Great-grandson.
A grandson whose father is dead, and a great-grandson whose father and grandfather are dead, have an equal right with the son.
4. Widow. 5. Maiden daughter. 6. Married daughter, who has and one who is likely to have a son, have equal right. On failure of either, the other.
7. Daughter's son.
8. Father.
9. Mother.
10. Whole-brother.
11. Half-brother.

If there be two brothers, whole and half, and both un-reunited, in that case the whole-brother is to take the deceased whole-brother's estate.

Where the half-brother is re-united, and the whole-brother is un-re-united, in that case both of them are to divide the property between themselves.

Where a whole-brother and a half-brother are re-united, then the re-united whole-brother alone is to take.

The right of inheritance of brother's sons also is to follow these rules.

12. Whole-brother's son.*

13. Half-brother's son.

If some of the whole-brother's sons be re-united, and others be un-re-united, then the re-united whole-brother's son alone takes.

Similarly, if some of the half-brother's sons be re-united, and others be un-re-united, then the re-united half-brother's son alone takes,

If the whole-brother's son be un-re-united, and the half-brother's son be re-united, then the two take together.

When both the whole-brother's and the half-brother's sons are, either re-united, or un-re-united, then in each case, the whole-brother's son alone takes.

14. Brother's son's son.

In his case also an order of succession similar to what obtains in the case of the whole and the half-brother's sons is to be understood.

15. Father's daughter's son.

According to Churamani, as noticed by Srikrishna in his *Dáyakramasangraha*, a whole-sister's son and a half-sister's son succeed together.

16. Brother's daughter's son.

17. Paternal grandfather.

18. Paternal grandmother.

19. Paternal uncle.

20. Paternal uncle's son.

21. Paternal uncle's son's son.

22. Paternal grandfather's daughter's son.

23. Paternal uncle's daughter's son.

24. Paternal great-grandfather.

25. Paternal great-grandmother.

26. Paternal grandfather's brother.

27. Son of No. 26.

28. Son's son to No. 26.

29. Daughter's son to No. 24.

30. Daughter's son to No. 26.

31. Maternal grandfather.

32. Maternal uncle.
33. Maternal uncle's son.
34. Maternal uncle's son's son.
35. Maternal aunt's son.
36. Mother's father's father.
37. Mother's father's brother.
38. Mother's father's brother's son.
39. Son of No. 38.
40. Mother's father's sister's son.
41. Mother's paternal great-grandfather.
42. Mother's paternal grandfather's brother.
43. Son of No. 42.
44. Son's son to No. 42.
45. Daughter's son to No. 41.

Then the descending Sakulyas, viz., the three descendants from the great-grandson's son downwards, in the male line, successively.

Then the ascending Sakulyas, viz., the ancestors from the great-grandfather's father upwards, in the male line, successively.

Then the descendants of these latter.

Then the Samanodakas.

Then the spiritual preceptor.

Then the disciple.

Then the fellow student who studied the Vedas from the same preceptor in fellowship with the deceased.

Then persons of the same village, belonging to the same gotra.

Then persons of the same village, having the same pravaṛa.

Then the Brahmians of the same village, who are learned in the three Vedas.

Then the king, excepting a Brahman's wealth.

APPENDIX VI.

TABLE OF SUCCESSION IN ACCORDANCE WITH THE RULES LAID
DOWN BY MR. JUSTICE DWARKANAUTII MITTER, IN THE CASE OF
GURU GOBINDO SHAHA, 13 W. R. F. B. 49.

1. Son.
2. Grandson.
3. Great-grandson.
4. Widow

5. Unmarried daughter.
6. Married daughter, having or likely to have a son.
7. Daughter's son.
8. Father.
9. Mother.
10. Re-united whole brother.
11. Un-re-united whole brother and re-united half-brother together.
12. Un-re-united half-brother.
13. Brother's son. (1)
14. Brother's son's son. (2)
15. Father's daughter's son, or the son of a sister, whole or half.
16. Son's daughter's son.
17. Brother's daughter's son.
18. Son's son's daughter's son.
19. Brother's son's daughter's son, whether the brother be whole or half.
20. Grandfather.
21. Grandmother.
22. Father's whole brother (3)
23. Father's half-brother.
24. Father's whole brother's son.
25. Father's half-brother's son.
26. Father's whole-brother's son's son.
27. Father's half-brother's son's son.
28. Grand-father's daughter's son, whether it be the whole or half-sister of the father.
29. Father's brother's daughter's son, whether the whole or half.
30. Father's brother's son's daughter's son, whether the brother be whole or half.
31. Great-grandfather.
32. Great-grandmother.

(1.) The internal arrangement as among the different kinds of brother's sons is as follows :—

(a) Re-united whole-brother's son.

(b) Un-re-united half-brother's son and re-united whole-brother's son together.

(c) Un-re-united half-brother's son.

(2.) The internal arrangement as among different kinds of brother's son's sons is as follows :—

(a) Whole-brother's son's son.

(b) Half-brother's son's son.

(3.) As among father's brothers also, the rule determining the preferential right on the ground of re-union is to be applied, as in the case of one's own brethren.

33. Grandfather's whole-brother.
 34. Grandfather's half-brother.
 35. Grandfather's whole-brother's son.
 36. Grandfather's half-brother's son.
 37. Grandfather's whole-brother's son's son.
 38. Grandfather's half-brother's son's son.
 39. Grandfather's sister's son, whether the sister be whole or half.
 40. Grandfather's brother's daughter's son, whether the brother be whole or half.
 41. Grandfather's brother's son's daughter's son, whether the brother be whole or half.
 42. Mother's father, or maternal grandfather.
 43. Mother's brother, whole or half, or maternal uncle.
 44. Maternal uncle's son.
 45. Maternal uncle's son's son.
 46. Mother's sister's son, whether the sister be whole or half.
 47. Mother's brother's daughter's son, whether the brother be whole or half.
 48. Mother's brother's son's daughter's son, whether the brother be whole or half.
 49. Mother's father's father.
 50. Mother's father's brother, whole or half.
 51. Mother's father's brother's son, whole or half.
 52. Mother's father's brother's son's son, whole or half.
 53. Mother's father's sister's son, whether the sister be whole or half.
 54. Mother's father's brother's daughter's son.
 55. Mother's father's brother's son's daughter's son.
 56. Mother's great-grandfather.
 57. Mother's grandfather's brother, whole or half.
 58. Mother's grandfather's brother's son, whole or half.
 59. Mother's grandfather's brother's son's son, whole or half.
 60. Mother's grandfather's sister's son, whole or half.
 61. Mother's grandfather's brother's daughter's son.
 62. Mother's grandfather's brother's son's daughter's son.
- Then come Sakulyas, as follows :—
63. Great-grandson's son.
 64. Great-grandson's son's son.
 65. Great-grandson's great-grandson.
 66. Great-grandfather's father.
 67. Descendants of No. 66 in the male line as far as the sixth degree ; the degrees are to be counted excluding himself. Then such of the descendants of No. 66 in the female line, as offer pinda to him.

68. Then great-grandfather's grandfather and his descendants of the same kind as those of No. 66, both in the male and in the female line.

69. Great-grandfather's great-grandfather and his descendants of the same kind, as those of No. 66, both in the male and in the female line.

Then the Samanodakas, viz :—

70. The seventh ancestor from the deceased, counting his father as one.

71. Then the descendants of No. 70 in the male line and such descendants of the daughter's son kind, as offer pinda to No. 70.

So on as far as relationship with the deceased can be traced.

N.B.—The Sakulya relationship extends as far as the sixth degree of ascent or descent.

See *Dáyabhāga*, Ch. XI. S. vi. para. 21.

The Samanodaka relationship extends so far as common descent can be traced. See *Vrihanmanu* quoted in the *Mitákshará*, Ch. II. S. v. para. 6.

Lastly come the specified strangers, enumerated at the end of Appendix Nos. 2, 3, &c.

